Lectures on
FAMILY LAW - II
(Muslim & Personal Laws)

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Part - I

Mohammedan Family Law

Lecture - I

Muslim Personal Law

Introduction: As stated earlier, personal law is applicable to a particular religion. As such, the Mohammedan (Muslim) personal law is applicable to the Mohammedans (Muslims) only. The very foundation of the Mohammedan law is the Koran (Quran), the holy/ divine book of Muslims (like Bhagawat Gita for Hindus). According to Quranic Theory, Muslim law has existed since the beginning of the world. This Lecture covers the following heads:

1. Who is a Muslim?
2. Sources of Muslim Law.
3. Schools of Muslim Law.
4. Marriage:
   - i) Meaning & Definition.
   - ii) Essential Elements.
   - iii) Object of Muslim Marriage.
   - iv) Nature of Muslim Marriage.
5. Kinds of Muslim Marriage.
   - i) Sahih or valid or regular marriage.
   - ii) Batil or Void Marrige.
   - iii) Fasid or Invalid or Irregular Marriage.
6. Iddat or Iddat period.
7. Muta Marriage (Tamtaa Tum).
8. Dower (Mahr); and
9. Dissolution of Marriage
10. Muslim Divorced Woman's Right to Maintenance.

1. WHO IS A MUSLIM

According to Aghnides a Muslim is (i) one, who believes in the mission of Mohammad as Prophet, or (ii) one, who says that there is one God and that Mohammad is "His Prophet" or (iii) one who believes in a number of other essential beliefs in God and Mohammad. Amir Ali says ".....Any person who professes the religion of Islam, in other words, accepts the unity of God and the prophetic character of Mohammad is a Muslim...."

A person, who professes Muslim religion (Mohammedanism) is a 'Mulsim'. A Muslim is also one, "who believes in oneness of God". Usually, a person becomes a Mahomedan by birth to parents, who profess Mohamedanism. Further, any person of other religion can become a Mahomedan by converting into Mahomedanism. The principle of monogamy in respect of a woman is strictly complied with, not only in Hindu law, but also in Mahomedan law. The word 'Muslim' in Arabic is the active participle of 'Aslame' which is acceptance of the faith and of which the noun of action is 'Islam'. In English the word 'Muslim' is used both as a noun and as an 'adjective' and denotes both the persons professing faith and something peculiar to Muslims, such as, Mohammedan law, Mohammedan culture etc. The Muslims believe in the Divine origin of their holy 'Koran' which according to their belief was revealed to the Prophet by Gabriel. For the purpose of the application of Muslim Law, Muslims may be categorised under the following two heads namely:

1. Muslims by origin; and
2. Muslims by conversion
   - i) Converts by profession of Islam; and
   - ii) Converts by formal ceremonies.

1. Muslims by Origin: A Muslim by origin is a person, who believes in (subscribes to) the basic tenets of Islam namely,

i) the principle of the unity of God - God is one; and

ii) Mohammed is the Prophet of God.

'Islam' means "peace of submission to God's will". The essence of Islam or Mohammedanism consists in the faith that there is only one God and that Mohammed is his Prophet.

A person is regarded as a Muslim by birth in the following two cases:

i) if he is born of Muslim parents (if both of his parents are Muslims); and

ii) if one of his parents is a Muslim and is brought up as a Muslim.

It is immaterial whether the child is legitimate or illegitimate and has faith in islamic rites and ceremonies or not.

If a man is born a Muslim, the presumption is that he is a Muslim until he renounces the religion. According to the *Shariat* if one of the parents is Muslim the child is to be treated as a Muslim; but in India, it has been held that a child is presumed to belong to the religion of the father.

It is not necessary that a Muslim be so by birth. In fact Islam depends on belief. A man can be Muslim even by profession or by conversion. According to *Shariat* if one of the parents is Muslim, the child will be Muslim. However in India it was held in *Skinner v. Orde* [(1871) 14 M.I.A. 309] that the child is presumed to belong to the religion of the father. The facts of this case are interesting to note. In this case one Helen Skinner was married in Christian form to George Skinner. After the death of her husband the wife cohabited with some other Christian. The subsequent husband was already married and his first wife was alive. In order to legalize their union, both went through the ceremony of conversion to the Muslim faith. Privy Council held that such a marriage was of doubtful validity. In *Bhaiya Sher Bahadur v. Bhaiya GAnga Baksh Singh* [41. I.A.I] the illegitimate son of a Hindu by a Muslim lady, who was brought up as a Hindu and married to a Hindu girl according to Hindu rites, was held to be a Hindu.

A person born as a Muslim continues to be Muslim until he renounces Islam after attaining majority. A Court of law is not

concerned with peculiarities in belief, orthodoxy or heterodoxy, so long as the minimum of belief exists.

2. Muslim by Conversion: "Conversion is a process by which a person gets converted from one religion to another by performing the formalities/ceremonies if any prescribed for the conversion". After conversion, he is called `convert'. Muslim converts are subdivided into two categories namely:

i) Converts by profession of Islam; and

ii) Converts by formal ceremonies.

i) Converts by profession of Islam: A non-Muslim may become a Muslim by professing Islam i.e. by acknowledging that there is only one God and Mohammed is his Prophet. Mere profession is enough and the motive is immaterial. The conversion to be valid, it must be bonafide and honest. If the convert does not practise Islam, it will not disqualify him to be a Muslim.

ii) Converts by formal ceremonies: A non-Muslim may be converted as Muslim by performing/undergoing the formal ceremonies prescribed under Islam. The ceremonies are very simple. The person seeking conversion shall go to a Muslim mosque. On the Imam asking him, "Are you voluntarily embracing Islam", if he answers affirmatively, he is given the kalma to recite. On the completion of recitation of the Kalma, the conversion ceremony is over and the non-Muslim becomes a Muslim. Then, the Imam confers a Muslim name on the convert. Majority of mosques maintain registers to record the names and signatures of the converts.

Conversion to Islam and rights of inheritance: In the absence of a custom to the contrary, in case of a Hindu converting to Islam, succession and inheritance are governed by Mohammedan Law and not by Hindu Law (*Vohra Bai Khatija Isabhai v. Vohra Karimbhai*, AIR 1974 Guj.4).

Where a Hindu, who had a Hindu wife and children, embraced Islam, and married a Muslim woman and had children by her, his property would pass on his death to his Muslim wife and children and not to his Hindu wife or children because under Muslim Law,

a Hindu cannot succeed to the estate of a Muslim (*Chandra Sekharappa v. Govt. of Mysore,* AIR 1953 Mys. 621).

In view of the above discussion, it is to be noted that, a Muslim should be a born Muslim. He may also be a Muslim by profession or conversion. Therefore, a Muslim may be defined as one who is a Muslim by birth, who has become a Muslim by conversion and who simply profess to be a Muslim in minimum belief that there is only one God and Mohammed is His (last) Prophet.

2. SOURCES OF MUSLIM LAW

The Sources of Muslim Law may be studied under the following heads:

1. Ancient Sources;
2. Custom; and
3. Modern Sources

1. Ancient Sources: There are four ancient sources of Muslim Law namely:

i) The Koran (The Quran);

ii) The Sunna (Tradition);

iii) The Ijma; and

iv) The Kiyas (The Quiyas)

All the schools of Muslim law accept the first two (i.e the Koran and the Sunna) as the primary sources. With regard to the Ijma and the Kiyas as the sources of Muslim Law, there is a conflict of opinion among the various schools of Muslim Law and the jurists.

i) The Koran (Quran): The word 'Quran' is derived from the word "Qure" like 'Qure-et', is the divine communication and revelation to the Prophet of Islam. The fundamental and primary source of Muslim Law is 'Koran'. It contains the very words of God as communicated to Prophet Mohammad through angel Gabriel. It is the basis on which the very structure of Islam rests upon. Quran regulates the individual, social, secular and spiritual life of the Muslims. It is the holy/divine book of Muslims. It contains 6000 verses divided

into 30 parts and 114 chapters. 200 verses deal with the rules and principles of law. Of these 200, 80 verses relate to Family Law and the rest deal with state and polity. Koran distinguishes truth from falsehood and shows right path to human beings. The contents of Koran have spiritual value and hence Muslims proclaim that their law cannot be changed/modified by the Union Parliament or State Legislature.

The contents of Quran may be classified under the four heads:

i) Metaphysical and abstract;

ii) Theological;

iii) Ethical and Mystical, and

iv) Rituals and legal.

The Quran says: "Whatever the Prophet gives accept it, and whatever he forbids you abstain from it". (LIX: 7).

It also says:- "He does not speak out of his desire. It is not but the revelation revealed to him". (LIII: 3-4).

"Obey God and obey the messenger". (IV: 58).

ii) The Sunna: The term 'Sunna' literally means "the trodden path, a procedure, a way of action", i.e. some kind of practice and precedent. In Muslim Law, it has come to mean the utterances, deeds and the practices of the prophet. The Koran is said to contain the very words of God, while the Sunna embodies the practices, the deeds, the actions and the approvals of the Islamic religion rather than with positive law.

With the death of Mohammed the living source of inspiration terminated and a reference to him being no longer possible, the problem had to be decided by supplementary provisions of the Quran by facts from the life of the Prophet and from his sayings. The term 'sunna' is applied to the traditions or precedents not merely emanating from the Prophet but also his companions, successors and successors of successors from the general body of the ulema.

iii) The Ijma: The third source of law, both from the point of time and importance is the Ijma. The Koran (Quran) and Sunna look

to the past, while the Ijma and Kiyas deal with the future of the Islamic jurisprudence. The term 'Ijmaa' denotes the consensus of opinion of the companions of the Prophet, ;or even of highly qualified legal scholars Sir Abdur Rahim has defined Ijmaa as "the agreement of the jurists among the followers of Mohammad in a particular age on a particular question". After the death of Prophet and as the expansion of Islamic influence took place a large number of fresh facts and new problems cropped up which could not be decided by reference only to Quran and Ahadis. The jurists then took the recource through the principle of Ijmaa, that is the consensus of opinion of jurists on any question. Ijmaa once established cannot be replaced. It may be defined as the "agreement of the jurists among the followers in a particular age on a particular question". The validity of the Ijma is based upon a sunna of the prophet, which declares that "God will not allow His people to agree on an error". Ijma has validity so long as it is not opposed to the Koran or to the Sunna.

iv) The Kiyas (Qiyas): The term 'Kiyas' is derived from the Hebraic term 'Liqqish' and from an Aramic root, meaning "to beat together". Qiyas means, "to extract a new statement by comparing two existing statements". In Arabic usage, it means "measurement". Qiyas means "analytical deductions, measuring accord or equality". Abdul Rahim says "The Kiyas is a process of deduction by which the law of a text is applied to cases, which though not covered by the language, are governed by the reason of the text. Shias (one of the sects of Muslims) do not accept Kiyas as a source of law.

Qiyas does not lay down a proposition of law and is more in the nature of an application of law, as it is contained or obtained from the primary three sources. Qiyas is not universally recognized as a source of law. Shias do not accept it, as for them, if the scope of the law needs to be widened, it should be at the behest of the Imam, and no one else. Even some sunni jurists do not recognize the Qiyas.

2. Custom (Place of Custom in Mohammedan Law): A custom is a tradition passing on from one generation to another, that originally governed human conduct and has obtained the force of law

in particular locality. It is a natural source of law. The jurists of all the schools of Muslim law have maintained that there are only four formal sources of Muslim law viz. the Koran, the Sunna, the Ijma and the Kiyas and the Custom has not been enumerated among the sources of Muslim law. However, when mass conversions took place in India, the converts were allowed to follow their pre-existing law, which included custom in matters relating to inheritance. So, Khojas, Sunni Bohras etc., who embraced Islam were allowed to be governed by the Hindu law of succession on the basis of custom. Similarly, the Mohammedan law as to iddat was not recognised in Punjab according to customary law. In this way, in Mohammedan law, custom played an important role as a source of law. Custom as a source of law (customary law) was superseded with the passing of the Shariat Act, 1937.

Shariat means "the divine law or path to be followed" as found in the four sources of Muslim law as stated above. Sec.2 of the Shariat Act, 1937 lays down that, in regard to succession, marriage, divorce, maintenance, dower, guardianship, gifts, trusts and wakfs, the Shariat i.e. Muslim Personal Law Should apply notwithstanding any custom or usage to the contrary. However, in matters of adoption, wills and special property of woman, the courts will apply Muslim law if the parties make a declaration to that effect. If no such declaration is made, the courts may apply either Muslim law or Customary law or any other law.

Conditions of a valid custom:

i) General prevalence in the country is necessary. The practice of a limited number of individuals cannot be recognized as custom;

ii) It must be territorial;

iii) It need not be existing from the time of the Prophet's companions. All that is necessary is that it should be immemorial. The word 'immemorial' means beyond human memory. Customs springing up within living memory, will be enforced if prevalent among the Muslims of the country in which the question of their validity arises;

iv) It must be ancient and invariable; and

v) It should not be opposed to public policy.

3. Modern Sources: During British period, Muslim law has undergone so many modifications. The vehicles of these modifications are explained below (as the modern sources):

i) Equity, Justice and Good Conscience;

ii) Precedent; and

iii) Legislation.

i) Equity, Justice and good conscience: The doctrine of equity, justice and good conscience is no exception to Muslim Law. Abu Hanifa, the founder of the Hanafi sect of Sunnis, expounded the principle that the rule of law based on analogy could be set aside at the option of the Judge on a liberal construction of juristic preference to meet the requirements of a particular case. These principles of Muslim Law are known as Istihsan or 'Juristic Equity'. Istihsan literally means approbation and may be translated as 'liberal construction' or 'juristic preference'. This term was used by the great Jurist Abu Hanifa to express the liberty that he assumed of laying down the law, which in his discretion, the special circumstances required, rather than law which analogy indicated. Several areas of Muslim law were modified so as to meet the changing conditions in India.

ii) Precedent: Judges, while deciding a particular case, enunciate, what a law is: Such decisions are regarded as precedents or judicial precedents for deciding the future cases. A precedent is not merely an evidence of law but a source of it and the courts of law are bound to follow the precedents. Strictly speaking, judicial decisions only declare the law as it is and are not a source of it but they undoubtedly supplement and modify the law. Muslim Law is no exception to this rule. While applying and interpreting law in a particular case, the Judge expressly or impliedly declare as to what law would apply in a particular circumstances. The decisions become an authority for subsequent cases arising in subordinate courts. Thus, decisions of Supreme Court are binding upon all the courts of India and decisions of the High Courts are binding upon the subordinate

courts. The Muslim Law has been supplemented on many points by the judicial decisions.

During British period, the common law doctrine of precedent became a part of Muslim law. These twin doctrines viz. equity, justice and good conscience and precedent were applied by the judges to modify the rules of Muslim law. There are several decisions, which settled certain conflicts in Muslim law and were followed in subsequent cases as the precedents.

iii) Legislation: During British period, the rulers proclaimed the policy of not interfering with the personal law of the Indians. As a result, Muslim law suffered a lot. At that time, a few legislative modifications came into existence.

In India, Muslims at present are governed by various legislations passed by the Parliament are State legislatures. Notable among them are, The Usurious Loans Act, 1918, Religious Toleration Act, Feedom of Religion Act, 1850, the Guardians and Wards Act, 1890, the Mussalman Wakf Validating Act, 1913, the Mussalman Wakf Validating Act, 1930, Wakf Act, 1954, the Child Marriage Restraint Act, 1929, the Shariat Act, 1937, and the Dissolution of Muslim Marriage Act, 1939, the Indian Contract Act, 1872, have considerably affected, supplemented and modified the Muslim Law. In 1986 an Act i.e. Muslim Woman (Protection of Rights on Divorce) Act, 1986 to provide separate law in respect of divorced Muslim women was enacted by the Indian Parliament.

3. SCHOOLS OF MUSLIM LAW

During the lifetime of Prophet Mohammed, there were no schools of Muslim law and the Principles of Muslim law were uniform at that time. After the death of the Prophet Mohammed, the question of succession to prophet arose. There were two conflicting views/ opinions among the Arabs. One group supported election method/ principle, while the other group supported the principle of inheritance. According to the first view (i.e. election method), the successor to Prophet Mohammed should be elected by the Muslim community. The other view (i.e. the principle of inheritance) the legal heir of

the Prophet Mohammed should succeed. The members of the first group, who supported the Election principle/method came to be known as 'Sunnis'. While the other group, who supported the principle of inheritance came to be known as 'Shias'. Thus, there are two main schools of Muslim law namely – i) Sunni School, and ii) Shia School. Both the sects are subdivided into various schools as detailed below:

1. Sunni Schools: The Sunni schools were developed during the reign of the Abbadids. They are sub-divided into four as stated below:

i) Hanafi School;

ii) The Maliki School;

iii) Shafei School; and

iv) Hanbali School

i) Hanafi School: It was founded in Kufa (which is now modern Iraq) and is also known as 'the Kufa School'. It is named after its founder Imam Abu Hanifa. The Hanafi School is well represented in Iraq, its home country and also in Syria. It covers vast majority of Muslims all over India. The Hanafi School is very important in respect of matrimonial law.

ii) The Maliki School: It is also known as the Madina School. It is named after its founder Maliki-Ibn-Anas. The Maliki School spread westward over practically the whole of North Africa, Central and West Africa and upto Spain. Many Muslims of the eastern coastal areas of Arabia are followers of the Maliki School. The Maliki School and Hanbali School have hardly any adherents in India.

iii) The Shafi School: It is founded in Egypt and is named after its founder Imam Shafi, a pupil of Malik. The Shafi School spread to lower Egypt, Hejha, South Arabia, East Africa and some parts of Iraq and Persia. There are some Shafis on the West Coast of India as well as in Central Asia.

iv) The Hanbali School: It was founded by Imam Ahmad Ibn Hanbal. The Hanbali School prevails in Saudi Arabia.

2. Shia Schools: Imam Jafar as Sadik, the Sixth Imam of Imamias, founded the Shia School (and hence, the Shia School is earlier than the Sunni Schools). After the sunnis, the Shias consist of the next largest group of Muslims in India. The Shias do not accept any tradition. According to them, the Imam is the final interpreter of law.

The Shia Schools are sub-divided into three as follows:

i) The Ismailiyas;

ii) Athna Asharias or Immamia; and

iii) The Zaidyas.

i) The Ismalyas: After the death of Jafar, minority of Shias followed his elder son, Ismail, and hence, they came to be known as 'Ismailias'. Originally, the Ismaili School prevailed in Egypt. In India, Ismailis are divided into two groups namely: a) the Khojas; and b) the Bohoras (known as Eastern Ismailis and Western Ismailis respectively).

ii) Athna Asharias or Immamia: After the death of Jafar, the sixth Imam, majority of the Shias followed Musa Kazim. This sect came to be known as Ithna Ashari School. Almost half of the Muslim population of Iraq belongs to this sect.

iii) The Zaidyas: After the death of the fourth Imam Zaynul Abidin, one faction of the Shias accepted his son Zayd as their Imam and hence came into existence, the first school of Shias, the Zaidas.

4. MARRIAGE

i) Meaning and Definition: The Arabic word *nikah* (marriage) literally means the union of the sexes and in law, this term means 'marriage'. In Baillie's Digest, marriage has been defined to be 'a contract for the purpose of legalizing sexual intercourse, and procreation of children.'

Marriage is the 'nucleus' of the family. The very foundation of the family and society is the marriage. It confers on parties, the status of husband and wife and gives rise to certain rights and

obligations and of legitimacy of their children. In Mohammedan Law, marriage (Nikah or Shadi) is regarded as a 'civil contract'. Nikah is an Arabic Word, which literally means "the union of two sexes".

Ashabah says – 'Marriage is a contract underlying a permanent relationship based on mutual consent on the part of man and woman'.

Dr. Jang is of opinion that – 'Marriage though essentially a contract is also a devotional act; its objects are right of enjoyments and procreation of children and regulation of social life in interest of society.'

Similar is the view of Abdur Rahim, who says – 'The Mohammedan jurists regard the institution of marriage as partaking both of the nature of *ibadat* or devotional acts and *muamalat* or dealings among men.'

According to Hedaya – 'Marriage is a legal process by which the sexual intercourse and process by which the sexual intercourse and procreation and legitimizing of children between man and woman is perfectly lawful and valid.

According to Ashbah – 'Marriage is a contract underlying permanent relationship based on mutual consent on the part of a man and a woman'.

As per Tyabji – 'Marriage brings about a relation based on and arising from a permanent contract for intercourse and procreation of children, between a man and woman, who are referred to as 'parties to one marriage' and who after being married, become husband and wife.'

According to Ameer Ali – 'Marriage is an institution ordained for the protection of society, and in order that human beings may guard themselves from foulness and unchasity'.

As per Justice Mahmood – 'Marriage is a civil contract upon completion of which by proposal and acceptance all the rights and obligations which it creates, arise immediately and simultaneously.'

Mulla defined Nikah as "a contract, which has for its object, the procreation and legalizing of children".

Wilson defines a Muslim marriage as "a contract for the purpose of legalizing sexual intercourse and the procreation of children".

As per Section 2 of Law of Marriage (Compendium of Islamic Laws compiled by All India Muslim Personal Law Board), 'Marriage is an agreement between a man and a woman, based on the *Shariat* principles as a result of which mutual sexual relation becomes legitimate, paternity of obligations becomes enforceable.

According to Muslim Law, marriage is not a sacrament but a civil contract. All the rights and obligations it creates arise immediately and are not dependant on any condition precedent such as the payment of dower by a husband to wife (*Abdul Kadir v. Salima* (1886) 8 All. 149).

Judicially, Mahmood J (in *Abdul Khadir vs. Salima,* 8 All 149 (FB) defines a Muslim Marriage as "a civil contract, upon the completion of which by proposal and acceptance, all the rights and obligations, which it creates arise immediately and simultaneously. It was further observed: *"marriage among Mohammedans is not a sacrament, but purely a civil contract".*

Justice Mitter, in *Saburannissa v. Sabdu Sheikh* (AIR 1934 Cal. 693) observed, 'The marriage under Muslim Law is a civil contract and is like a contract of sale. In the contract of marriage the wife is the property and dower is the price.

Section 4 of the Law of Marriage (Compendium of Islamic Law) compiled by All India Muslim Personal Law Board says, 'Marriage is compliance with injunctions of God's Book and His Prophet's Sunnat; further it is the source of perpetuation of human race and attainment of chastity due to which human beings are protected against committing what is absolutely prohibited by religion. In the eyes of the Shariat, therefore, marriage is not just a civil contract; it is also worship.'

ii) Essentials of a Valid (SHAHIH) Marriage: A Muslim marriage (Nikah/Shadi) to be valid, the following conditions are to be satisfied:

A) Civil Contract.

B) Capacity of Parties.

C) Free Consent; and

D) Prohibited Degrees of Relationship.

A) Civil Contract: A Muslim marriage is purely a civil contract. As in the case of a contract, there are two parties. One party makes a proposal (of marriage) and the same is accepted by the other at one meeting.

a) Proposal (Ijab) and Acceptance (Qabool): The proposal is made by the bridegroom. The proposal is called 'Ijab'. The proposal consists the amount of dower. The bride sits behind the pardah with the relatives accumulated for this purpose.

b) At one meeting: The Ijab and Qabool must be done at one meeting. The Ijab at one time, and Qabool at another time, make the marriage void.

c) Consent: The consent of both the parties must be free will, not under undue influence, misrepresentation or coercion. Marriage under compulsion is not valid under Sunni and Shia Schools. But it is valid under Hanafi Sub School.

According to the Shias, witnesses are not necessary. But according to the Sunnis, two male witnesses or one male and two female witnesses, who are sane and adults should be present. Absence of witness renders the marriage irregular, but not void.

B) Capacity of Parties: The parties to the marriage must be competent to marry. In Muslim Law, a person, who is sane (sound mind) and has attained puberty is competent to marry. The person, who has not attained puberty is a minor. The age of puberty for both a boy and girl is 15 years.

Puberty means the age at which a person becomes capable of performing sexual intercourse and procreating children. Puberty and majority are in the Muslim law one and the same.

The presumption is that a person attains majority at 15, but the Hedaya lays down that the earliest period for a boy is 12 years and

for a girl 9 years. Under Shia law, in the case of males, puberty is presumed to be attained at the age of 15 years but in case of females it is 9 years.

The parties should have the capacity to contract marriage. 'Capacity to contract' implies that:

i) the parties must understand the nature of the contract i.e. they must be of sound mind;

ii) they should be adults i.e. baligh (major) and Rashid, unless their marriage is contracted by their respective guardians, and

iii) both the parties act of their own free will.

Those persons, who are not of sound mind, i.e. are lunatics or who have not attained puberty i.e. are minors, can be contracted in marriage by their respective guardians. But after the children become Baligh or the insane become sane, they can endorse or abrogate the marriage. Minority is of two kinds – (i) age of discretion (saghir) and (ii) puberty (Bulugh).

Doctrine of Puberty or Option of Puberty (Khyar-ul-bulugh): (Imp. for Short Notes).

In Muslim Law, a person, who is sane and has attained the age of puberty is competent to marry. The age of puberty is the age at which a person becomes capable of performing sexual intercourse and procreation of children. In Muslim Law, a person, who has not attained the age of puberty is a minor. The age of puberty for both a boy and girl is 15 years.

If a boy or girl, without attaining puberty is given in marriage, the boy or girl can repudiate the marriage after attaining the age of puberty/majority. This right is known as *"the Option of Puberty"* or *"Khyar-ul-bulugh"*. This right shall be exercised within a reasonable time. In case of a boy (i.e. minor husband) it should be exercised before the ratification of the marriage by payment of the Dower or Mahr. (Mahr is an amount of cash or property paid by the bridegroom (husband) to the parents of the bride (wife) at the

time of marriage or later, in consideration for the marriage) or by cohabitation.

When a minor has been contracted in marriage by the father or paternal grand father, such marriage cannot be repudiated unless such father or grand father acted fraudulently or negligently. All the restrictions with regard to the option of puberty have been abolished by the Dissolution of Muslim Marriage Act, 1939. According to Sec. 2 of the Act, a Muslim wife is entitled to the dissolution of her marriage if she proves that the marriage has not been consummated or the marriage took place before she attained the age of 15 years or she has repudiated the marriage before attaining the age of 18 years. Mere repudiation does not render dissolution of the marriage. The dissolution must be confirmed by a competent court. (P.S:— Write about puberty in brief under capacity of parties and in detail if it is asked as an independent question).

C) Free Consent: The marriage to be valid, the parties must be freely consented to. If the consent is obtained by force or fraud, it is no consent and the marriage is not valid.

According to the Hedaya – 'A woman who is adult and of sound mind may be married by virtue of her own consent, although the contract may not have been made or accepted to by her guardians, and this, whether she be a virgin or saibbah'.

It is a general law among all sects that in case of an adult woman consent must come from her. Without her consent, consent of her father, grandfather etc., only is not sufficient, though in some cases permission to marry may be obtained from father or grandfather, wherever it was possible.

In order to validate the marriage of a boy or girl who has not attained the age of puberty, the consent of the legal guardian is necessary. The marriage of a minor girl without the consent of her guardian is void.

Under Hanafi law if the consent is obtained by fraud or compulsion, the marriage would be valid but only irregular and not void. Suppression of certain facts by any of the contracting parties

have been held to amount to fraud. Under Shia and Shafii law, such marriages where consent was obtained through fraud or compulsion are void. A Shia adult (attained majority) woman should obtain permission of her father or grandfather to marry, although she may be looking after her own affairs.

D) Prohibited Degrees of Relationship: The parties to the marriage should not be within prohibited degrees of relationship. The prohibition may be:

1. Absolute Prohibition; and
2. Relative Prohibition.

The absolute prohibition renders the marriage void. While the relative prohibition renders the marriage irregular.

1. Absolute Prohibition: It is sub-divided into:

(A) Prohibited degrees of relationship:

(i) Consanguinity;

(ii) Affinity;

(iii) Fosterage

(B) Polyandry

(i) Consanguinity: It means "blood relationship". A marriage between the following relations is prohibited and void:

(a) Mother and son;

(b) Grandmother (how high so ever); and grandson (how low so ever);

(c) Brother and Sister;

(d) Uncle and niece (how low so ever); and

(e) Nephew and aunt (how high so ever).

(ii) Affinity: It means "relationship by marriage". A man should not marry his

(a) Wife's mother or grandmother how high so ever;

(b) Wife's daughter or grand daughter how low so ever; (if marriage with wife is consummated);

(c) Wife of father or paternal ancestor;

(d) Wife of son or son's son or daughter's son how low so ever.

(iii) Fosterage: It means foster relationship. If a woman suckles the child of another, foster relationship is created. Thus, a marriage between two persons having foster relationship is prohibited.

(B) Polyandry: If a woman has two husbands, it is called "bigamy". If she has several (more than one) husbands, it is called "Polyandry". A Muslim man can have four wives at a time. But a Muslim woman cannot have more than one husband. If so, the marriage is void.

2. Relative Prohibition: Relative prohibition viz. absence of witnesses, polygamy (having several wives) i.e. more than four wives, marriage during 'iddat period' etc. renders the marriage irregular and not void.

iii) Objects of Muslim Marriage: A glossary on *Tarmizi* sets out five objects of marriage:

a) the restraint of sexual passion;

b) the ordering of domestic life;

c) the increase of the family;

d) the discipline of the same in the care and responsibility of wife and children, and

e) the upbringing of virtuous children.

Hedaya – 'speaks of the ends of marriage as (i) cohabitation, (ii) society, and (iii) equal friendship.'

The Prophet said – 'Men marry women for their piety, or their property, or their beauty, but you should marry for piety'. (Tarmizi).

The purposes of marriage are perpetuation of human race and attainment of chasity, continence, mutual love, affection and peace.

iv) Nature of Muslim Marriage: There has been a conflict of opinion as to the nature of Muslim marriage. Some opine that, Muslim marriage is a mere civil contract and not a sacrament, while some others opine that it is a religious sacrament in nature.

Muslim marriage, by some text writers and jurists, is treated as a mere civil contract and not a sacrament. This observation seems to be based on the fact that marriage, under Muslim law, has similar characteristics as a contract. For instance:

1. As marriage requires proposal (Ijab) from one party and acceptance (Qubul) from the other so is the contract. Moreover, there can be no marriage without free consent and such consent should not be obtained by means of coercion, fraud or undue influence.

2. Just as in case of contract, entered into by a guardian, on attaining majority, so can a marriage contract in Muslim law, be set aside by a minor on attaining the age of puberty.

3. The parties to a Muslim marriage may enter into any ante-nuptial or post-nuptial agreement which is enforceable by law provided it is reasonable and not opposed to the policy of Islam. Same is the case with a contract.

4. The terms of a marriage contract may also be altered within legal limits to suit individual cases.

5. Although discouraged both by the holy Quran and Hadith, yet like any other contract, there is also provision for the breach of marriage contract.

The analogy of marriage contract with contract of sale as pointed out by Justice Mahmood in the leading case of *Abdul Kadir v. Saslima* [(1886) 8 All 149], and Justice Mitter in *Subrunnisa's* case also emphasizes the contractual aspect of Muslim marriage.

'Dower, under the Mohammedan law, is a sum of money or other property promised by the husband to be paid or delivered to the wife in consideration of the marriage.'

In Hedaya, it is laid down, 'The payment of dower is enjoined by the law merely as a token of respect for its object (the woman),

wherefore the mention of it is not absolutely essential to the validity of a marriage, and, for the same reason, a marriage is also valid, although the man were to engage in the contract on the special condition that there should be no dower'.

Another view is that marriage is not purely a civil contract but a religious sacrament too. Though sacramental nature of marriage is considered as an orthodox view but it is also supported by the Judiciary. *Anis Begum v. Mohammad Istafa* [(1993) 55 APP 743] is a leading case on the point where C.J.Sir Shah Sulaiman has tried to put a more balanced view of the Muslim marriage by holding it both a civil contract and a religious sacrament.

While reviewing the Abdul Kadir's case, Justice Sulaiman in Anis Begum's case observed: 'It may not be out of place to mention that Maulvi Samiullah (D.J.Raibareilly) collected some authorities showing that marriage is not regarded as a mere civil contract but as a religious sacrament. Though the learned C.J. does not himself say that marriage is a sacrament, but from the context in which he said, it is clear that he supported the view of Maulvi Samiullah.

Taking religious aspect into account Muslim marriage is an ibadat (devotional act).

The Prophet is reported to have said the marriage is essential for every physically fit Muslim who could afford it. The Prophet says 'O assembly of youths, whoever among you is able to have, he should marry, for it is a restraint to the looks and he who is not able let him keep fast'.

Justice Mahmood's observation i.e. marriage is a civil contract cannot be appreciated only because that upto some extent marriage resembles with civil contract. After observing minutely it will be found that besides some similarities there are so many basic differences between the two. For instance.

Muslim marriage is not merely a civil contract, because:

i) unlike civil contract, it cannot be made contingent on future event, and

ii) unlike civil contracts, it cannot be for a limited time (muta marriage is an exception),

iii) unlike civil contract, the analogy, of lien cannot be applied to a marriage contract. Secondly, the contract of sale of goods may be cancelled by unpaid seller. He may resell the goods by rescinding such contract, whereas in a contract of marriage, the wife is not entitled to divorce her husband or to remain with a third person if a part of his dower remain unpaid. Thirdly, taking into account the view of Justice Mitter that marriage among Muslims is nothing but a contract for sale of goods-there are buyer and seller in a contract of sale and the subject matter is goods; whereas, in a contract of marriage, the wife herself is to receive dower and not her parents then who is seller and what has been sold. Let us suppose that woman is seller and woman's personality is the thing to be sold. This is against the basic principles of natural justice for, no one is entitled to sell his or her personality.

One may conclude the nature of Muslim marriage by the observation of M.C.J. Jung – 'Marriage is an institution of Ibadat clothed in the legal form of contract regulating sexual intercourse, but its continuance is dependent upon the maintenance of conjugal affection.' In the ultimate analysis it can be said that the marriage in Islam is neither purely a civil contract nor as a sacrament. It is devoid of none but the blending of the two.

5. KINDS OF MUSLIM MARRIAGES

In Muslim or Mahomedan Law, marriages have been categorized under the following heads –

i) Sahih or Valid Marriage.

ii) Batil or Void Marriage, and

iii) Fasid or Invalid or Irregular Marriage.

i) Sahih or Valid Marriage: According to Law of Marriage (Compendium of Islamic Laws compiled by All India Muslim Personal

Law Board)l, 'A valid marriage is one in which are found all the essentials of and conditions for marriage' (Section 20).

Conditions: A Muslim Marriage to be valid, the following conditions are to be satisfied:

i) There must have been a proposal by one party and its acceptance by the other along with an agreed dower.

ii) The consent of parties is free.

iii) Proposal and acceptance must have taken place at one meeting and before the required number of witnesses. They must be adult Muslim and of sound mind.

iv) The parties must have capacity to contract marriage i.e. they should be of sound mind, major and capable to give free consent. If they are lunatic or minor, it should be done through their guardians.

v) There may not be of any prohibition of the union. There should be no impediment to marriage on the ground of consanguinity, fosterage, affinity or polyandry.

ii) Batil or Void Marriage: Section 50 of the Law of Marriage (compiled by All India MuslimPersonal Law Board), 'A void marriage is one which according to the Shariat does not come into existence at all.'

Mulla defines void marriage thus – 'A void marriage is one which is unlawful in itself the prohibition against the marriage being perpetual and absolute.

A marriage which has no legal result is termed batil or void. It is the semblance of marriage without the reality. A marriage contracted by parties suffering from absolute capacity i.e. prohibited on the grounds of consanguinity, affinity, fosterity, etc. is void.

iii) Fasid or Invalid or Irregular Marriage: In Islamic law, Sunni school considers three kinds of marriages namely valid, void and irregular (invalid) marriages. According to Shia school there is no irregular or invalid marriage and there are only two marriages:

valid and void marriages. The irregular marriages stand in between the void and valid marriages. Fyzee has classified irregular marriages into five classes, namely:

i) a marriage without witness,

ii) a marriage with a woman undergoing iddat,

iii) a marriage prohibited by reason of difference of religion,

iv) a marriage with two sisters, or contrary to the rules of unlawful conjunction, and

v) a marriage with a fifth wife.

Under Hanafi law a marriage contract entered into:

a) without the presence of witness, or

b) between persons prohibited from inter marrying by unlawful conjunction in iddat or divorce or religion or supervenient illegality is irregular and not void.

According to Section 51 of the Law of Marriage (compiled by All India Muslim Personal Law Board) 'An irregular marriage is one which is neither valid nor void. Before consummation such marriage is governed by the rules of marriage, and after consummation it gives rise to the effects and rules of marriage. In both these situations separation is necessary either by mutual renunciation or by the order of the qazi'.

According to Mulla, 'An irregular marriage is one which is not unlawful in itself, but unlawful 'for something else', as where the prohibition is temporary or relative, or when the irregularity arises from an accidental circumstances such as absence of witnesses.'

6. IDDAT OR IDDAT PERIOD

When a Muslim marriage is dissolved by death or divorce, the woman is required to remain in seclusion for a specified period. During this period, she is prohibited to remarry. This period is called "Idda" or "Iddat".

Iddat is the period during which it is incumbent upon a woman whose marriage has been dissolved by divorce or death, to remain in seclusion and to abstain from marrying another man.

In the words of Justice Mahmood, 'Iddat is the term by the completion of which a new marriage is rendered lawful.' Iddat is a period during which a woman is prohibited from marrying again after the dissolution of her first marriage i.e. the period of waiting or the period during which the previous existing marriage is considered to be undissolved for certain purpose notwithstanding that the husband had died or if alive had pronounced a divorce.

Muslim Law lays down that one should not marry a woman, who is undergoing idda. During the period of idda, her husband also cannot remarry. After the completion of idda, the woman can lawfully remarry. This prohibition is imposed with a view to ascertain the pregnancy of the woman so as to avoid confusion of paternity.

Ameer Ali defines, "Idda" is an interval, which the woman is bound to observe between the termination, by death or divorce of one matrimonial alliance and commencement of another".

Duration or period of Idda: Different periods of 'idda' are provided depending upon the manner in which the marriage is dissolved as detailed below:

i) Iddat of widowhood: When a person dies leaving a widow, she is prohibited from marrying before the expiration of 4 months and 10 days.

ii) Iddat of pregnant woman: If the widow is pregnant at the death of her husband, the Iddat will not terminate until delivery of miscarriage. If delivery or its miscarriage comes before 4 months and 10 days the remaining period will have to be observed.

iii) Iddat of Talaq: The period of Iddat in case of Talaq is three courses, if the woman is subject to menstruation, otherwise three lunar months. If the woman is pregnant at the time of divorce, the Iddat will not terminate till delivery.

iv) Iddat when marriage is irregular: If the marriage is irregular and parties have separated before actual consummation, there is no Iddat. If the consummation has taken place the wife is bound to observe Iddat.

v) If the marriage is not consummated, iddat has to be observed in the case of death, but not in the case of divorce.

vi) The period of iddat begins from the date of the divorce or death of the husband and not from the date on which the woman gets the information of the divorce or of the death of the husband.

The iddat due to the death of husband commences from the date of death. If the information of death does not reach the wife until after the expiration of the period of iddat she is not bound to observe iddat.

When a husband divorces his wife, the iddat period starts from the date of divorce. Where the husband dies in the period of iddat for a revocable divorce, the wife must observe fresh iddat for death.

Effects:

i) During the period of iddat, Muslim woman is not entitled to marry another person.

ii) During the period of iddat, the wife is entitled to maintenance.

iii) The wife is entitled to deferred dower.

iv) During the period of iddat, if any one of the parties to the marriage, dies, the other is entitled to inherit from him or her in his or her capacity of wife or husband respectively as the case may be, if the divorce has not become irrevocable before the death of the deceased.

v) If the husband has four wives including the divorced one, he cannot marry a fifth one, until the completion of iddat of the divorced wife.

vi) Where the husband pronounces talak three times during death – illness, and dies before completion of wife's iddat,

the wife is entitled to inherit from him even if the divorce has become irrevocable prior to his death.

A marriage performed during the period of idda is not void, but irregular. But, under the Shia Law, it is void. During idda, the woman is entitled to maintenance.

7. MUTA MARRIAGE (TAMTAA TUM)

The Shia law recognizes two kinds of marriage, namely, permanent and muta or temporary. Muta is a kind of temporary marriage recognized only in the Shia School of Muslim Law. A Shia of the male sex may contract a muta marriage with a woman professing the Mahomedan, Christian or Jewish religion, or even with a woman who is a fire-worshipper, but not with a woman following any other religion. But a Shia woman may not contract a muta marriage with a non-Muslim.

The term 'muta' implies 'enjoyment' or 'use'. According to Heffening muta means 'marriage for pleasure'. Muta marriage is a marriage for temporary but a fixed period after specifying dower.

Muta marriage is a kind of temporary marriage for a fixed period i.e. for a day, a few days, few weeks or years". A Shia woman cannot contract a muta marriage with a Muslim man. The period of marriage is fixed by entering into an agreement between the parties on payment of some consideration.

Essentials: A muta marriage to be valid, the following conditions are to be satisfied:

i) The period of cohabitation should be fixed.

ii) The amount of dower should be fixed. Half of the amount would be payable if the marriage is not consummated.

The muta marriage comes to an end on the expiry of the stipulated period. There is no divorce in respect of a muta marriage. Even before the expiry of the term, the husband may put an end to the marriage by making a gift of remaining term to her and paying the full amount of dower. Children born during the muta marriage are legitimate and are entitled to inherit property from both the parents.

8. DOWER (MAHR)

Meaning & Definition: In a Muslim marriage, the bridegroom promises to pay the bride, certain sum of money or other property in consideration of marriage. The amount or property is called "Dower or Mahr". The dower is paid to the parents of the bride and is regarded as a mark of respect to the bride.

Mehr is also known as sadaq, sadakat, niglat, atiya and akr. These words are attributed as Mehr in different situations and circumstances. These synonyms would signify the status of marriage contracting party or the circumstances.

The germ of law on Mehr (dower) can be found in the Quran as given below:

i) 'Give the woman on marriage their dower as a free gift, and if they are good enough to remit any of it themselves, then devour it with good digestion and appetite'. (Quran: Sura 4; Aayat 4).

ii) 'Even if ye had given a whole treasure in dower, take not the least but of it back....' (Quran: Sura 4; Aayat 20).

iii) 'If ye divorce a woman before consummation or the fixation of dower, bestow them a suitable gift; a gift of reasonable amount is from those who wish to do the right thing;

'And if ye divorce them before consummation but after fixation of dower for them, then half of the dower is due to them....' (Quran: Sura 2; Aayat 236 & 237 etc.).

Definition of Dower (Mahr): Following are some of the definitions.

Mahr or dower is a sum that becomes payable by the husband to the wife on marriage, either by agreement between the parties or by operation of law. It may either be prompt (Mu' ajjal), or deferred (Mu' wajjal).

According to Wilson – 'Dower' is a consideration for the surrender of person by the wife. It is the technical Anglo-Mohammedan term for its equivalent 'Mahr' in Arabic.

Ameer Ali defines – Dower is a consideration for wife's sole and exclusive use and benefit.

Dinshah F. Mulla – Dower is a sum of money or other property which the wife is entitled to receive from the husband in consideration of the marriage.

According to Mahomed Ullah Ibn S. Jung – 'Dower is the property, or its equivalent incumbent on the husband either by the reason of being agreed in the contract of marriage or by virtue of the contract as special consideration for buza the right of enjoyment itself.'

Saxena: Dower is a sum of money or any property promised (may be implied) by the husband to be paid or delivered to the wife as a mark of respect for the surrender of her person after the marriage contract which is generally said to be the consideration for marriage.

Law of Marriage (compiled by All India Muslim Personal Law Board in 'compendium of Islamic Laws') provides –

Dower is the mal (money or property of any kind) which is an obligation of the man towards the woman as a result of the marriage or its communication (Section 127).

Dower is a financial right arising from the marriage contract which is an obligation in all circumstances; even if at the time of marriage it was agreed upon that there will be no dower (Section 128).

The amount of dower may be fixed and paid either before, at the time of, or after marriage from the assets of the husband. The wife is competent to relinquish her dower provided she has attained puberty at the time of relinquishment.

The main object of dower (Mehr) is to provide a livelihood to the wife and children in the event of divorce. In other words, it protects the wife, against her husband in exercising the right of divorce. It also supplements the widow's share in her husband's estate after his death. The amount of dower may be fixed either before or at the time of the marriage. It can be increased after the marriage.

It can also be fixed by mutual consent after the marriage. It can be settled by the Judges or Arbitrators.

Kinds of Dower: The amount of dower may be fixed: (i) by entering into an agreement; or (ii) by operation of law. Accordingly, the dower may be classified as follows:

A) Specified Dower (Mehr-i-Musamma)

i) Prompt Dower (Muajjal Mahr)

ii) Deferred Dower (Muwajjal Mahr)

B) Proper Dower or Customary Dower (Mahr-i-Misl).

A) Specified Dower: The amount of dower settled by the husband is called 'specified dower'. If the husband is a minor, it is settled by the guardian. The specified dower must not be less than the value of 10 dirhams. Maximum is not fixed. The amount can be fixed either orally or in writing.

Specified dower may be sub-divided into two kinds namely:

a) Prompt Dower; and

b) Deferred Dower.

a) Prompt Dower: It is the portion of dower, which is payable on demand is called prompt dower. The prompt dower may be realised by the wife before or after consumption. In India, she has a right to refuse to live with her husband, till her prompt dower is paid.

b) Deferred Dower: The portion of Dower, which is payable on dissolution of the marriage, by death or divorce is called 'Deferred Dower'.

B) Proper or Customary Dower: When the amount of dower is not fixed (at the time of marriage) under the Contract, then the wife is entitled to proper dower. This is also known as customary dower. The amount of dower is settled upon, other female members of her father's family.

Confirmation of dower: The dower is confirmed (settled) by consummation of the marriage or by a valid retirement or by the death

of either the husband or the wife. She is having every right to realise the prompt dower.

Remission of dower: The wife can remit a part or whole of the dower in favour of her husband or his heirs. The remission must have been made with free consent.

Nature and Enforcement of Dower: If the dower is not paid, the wife can enforce it by filing a suit against her husband. If she dies, her legal heirs can sue. The period of limitation is three years. In case of prompt dower, the period of limitation starts, when the dower is demanded and refused. It starts from the date of dissolution of the marriage by death or divorce in respect of the deferred dower.

9. DISSOLUTION OF MARRIAGE

Dissolution of marriage means 'putting the marriage to an end'. It is a process by which the marital relationship between the husband and wife is extinguished. In Muslim Law, dissolution of marriage takes place by the following means:

A) By death of either spouse.

B) By the act of parties or Divorce

i) At the instance of husband (Talaq).

ii) At the instance of wife (Talaq-i-Tafwid).

iii) By mutual consent of both the husband and wife.

iv) By judicial process against petition for decree of divorce by either of spouses.

A) By death of either of the spouses: A valid marriage is dissolved or terminated at the death of husband or wife. In case of death of wife the husband is free to marry another woman immediately if he so wishes but in case of death of husband, wife has to undergo and observe period of iddat or in case she is pregnant, until she delivers, before she is entitled to marry, if she so wishes.

B) By the Act of Parties (Divorce): In Muslim Law, marriage is not a sacrament and is purely a civil contract. A Muslim marriage may be dissolved under the following ways:

i) At the instance of husband (Talaq).

ii) At the instance of wife (Talaq-i-Tafwid).

iii) By mutual consent of both the husband and wife.

iv) By judicial process against petition for decree of divorce by either of spouses.

i) At the instance/will of the husband (Talak)

Any Mahommedan, who is of sound mind and has attained puberty, can divorce his wife, whenever he desires by pronouncing talak. Talak may be effected orally or by written document called 'Talak Nama'. It may be pronounced even in her (wife's) absence and need not be addressed to her. It must come to her knowledge for the purpose of dower. Talak is pronounced in the presence of Kazi or of the wife's father or other witnesses.

Modes of Talak: Following are the different modes by which Talak is pronounced.

1) Talaq-al-Sunna: (i.e. conformity with the dictates of Prophet). Talaq al Sunna is again classified into two classes:

i) Talaq Asham (The most approved).

ii) Talaq Hasan (Approved).

2) Talaq al-Biddat (i.e. of innovation, therefore not approved)

i) Three declarations (the so-called triple divorce) at one time; or

ii) One irrevocable declaration (generally in writing).

1) Talaq al-Sunna (Proper Talaq): Talaq al Sunna (Sunnat) means a talaq which is in conformity with Sunnat i.e. the traditioin of the Prophet. In Talaq-ul-Sunnat, the husband has an opportunity to reconsider his decision and has the option to revoke it.

i) Talaq-e-Ahsan (very good talaq): 'Ahsan' means 'very good'. According to Ameer Ali, Prophet had approved talaq-e-Ashan from the beginning and is consequently regarded as the regular or proper and orthodox form of divorce. It consists of single pronouncement

is also called 'instant triple talaq'. This form of talaq was allowed by second Caliph of Islam, Umar. Talak-e-biddat could be pronounced by two ways:

i) In the first form, three pronouncements are made in a single tuhr, either in one sentence, e.g. 'I divorce thee triply or thrice' or in three sentences, 'I divorce thee, I divorce thee, I divorce thee'. Such a talaq is lawful, although sinful, in Hanafi law; but in Ithna Ashari and the Fatimid laws it is not permissible. This is called 'al-talaq al bain', irrevocable divorce.

ii) Another form of the disapproved divorce is a single irrevocable pronouncement made either during the perioid of tuhr or even otherwise. This form is also called 'at-talaq al-bain' (also called 'talaq-e-bain' or 'bain talaq' and may be given in writing. Such a 'bill of divorcement' comes into operation immediately and severs the marital tie. This form is not recognized by the Ithna Ashari or the Fatimid School.

This kind of divorce becomes irrevocable immediately at the option of the husband.

ii) At the Instance of Wife (Talaq-e-Tafwid) or Contingent Divorce or Delegated Divorce

A divorce may be pronounced so as to take effect on the happening of a future event. In this case, the husband can delegate to the wife his right of pronouncing divorce.

In Mohammedan law, the husband has the power to delegate his own right of pronouncing divorce to some third person to the wife herself, which is called tafwid (generally mis-spelt 'tafweez'). An agreement made either before or after the marriage where it is provided that the wife would be at liberty to divorce herself from her husband and under certain specified conditions, is valid, provided firstly, that the option is not absolute and unconditional and secondly, that the conditions are reasonable and not opposed to public policy.

Kinds of Tafwid: According to Syed Ameer Ali tafwid is of three kinds:

i) Ikhtiar, giving her the authority to talaq herself.

ii) Amr Bi-yad, leaving the matter in her own hand, and

iii) Mashiat, giving her the option to do what she likes.

i) Ikhtiar (by option or choice): The husband may say to his wife 'choose' or a similar word (in Arabic) in connection of talaq. Delegation of power is implied. By 'giving the choice' is meant giving her the choice to get rid of the matrimonial tie. This delegation of power of divorce to wife may be for a day, for a certain period of time or for all the times to come. This delegation may be made subject to certain conditions. When the wife divorces herself, she must say 'I am divorced' or 'I divorce myself' and not 'I divorce thee' because it is the wife who is divorced and not the husband.

ii) Amr Bi-yad (The affair is in your hands or you are at liberty: This expression may be conveyed to wife by the husband. Here also expression is implied. In case husband says 'divorce thyself thrice (or twice)' and she divorced only once, divorce would take effect because it is part of the delegation.

iii) Mshiat (at will or pleasure): In this form the delegation of right to talaq is in express form. While delegating the power to wife, the husband may say 'give yourself talaq when you please'.

iii) Divorce by Mutual Consent

In Muslim Law, marriage is a civil contract. Similarly, marriage may be dissolved by an agreement between the parties. This kind of divorce is known as 'divorce by mutual consent'. It is of two kinds namely:

1. Khula; and
2. Mubaraat.

1. Khula: The word khul means literally 'to take off or remove clothes' and thence, 'to lay down one's authority over a wife'. Raik gives its legal definition as it means 'getting rid of the ownership by marriage'.

Quran, the original source of Islamic Law, provides the system of Khula. In law it is the surrender of right of husband over his wife for an exchange.

According to Syed Ameer Ali, when the wife owing to her aversion to the husband, or her unwillingness to fulfil the conjugal duties is desirous of obtaining a divorce, she may obtain a release from her marital contract by giving up either her settled dower, or some other property, such a divorce is consequently called khula.

A khula divorce is accomplished at once by:

i) offer from the wife;

ii) its acceptance by the husband, and

iii) with an iwad (return, consideration) passing from the wife to the husband for redemption.

It is a divorce, which takes place at the instance of wife. But, it is effected with the mutual consent of the parties. She offers consideration to the husband for releasing her from matrimonial tie. She also discharges the husband from dower debt if any. When once it is accepted by the husband, it is irrevocable.

Rules of Khula: Law of Divorce (compiled by All India Muslim Personal Law Board in 'Compendium of Islamic Laws') provided in its Chapter II thus:

'Termination of marital relation by the husband in consideration for a return agreed upon by the parties is khula, whether it is through the word khula or by mubaraat, or by the word talaq or any of its synonyms.

Explanation: Khula is an agreement of a sort in which the husband puts an end, for a stipulated return, to his rights arising from marriage and is, therefore, like an irrevocable talaq, and since the return in it is to be paid by the wife, her consent is necessary. The offer of khula may emanate from either side, e.g. if the husband says 'I gave you khula in return for dower' and the wife says 'I accepted'. Or the woman says 'Give me khula in return for dower', and the husband says, 'I gave khula'. Sometimes this action takes place

through the word mubaraat i.e. the man would say 'I relieved you of marriage on the condition that you exonerate me of all your rights' and the woman 'I exonerated'. Sometimes words of talaq are used e.g. the husband says 'I divorced you in return for Rs.2000', and the wife 'I accepted'. Thus in the aforementioned definition of khula, a khula by the word khula, khula by the word mubaraat and khula by the words divorce for consideration, all are included (Section 64).

In a khula only those rights will abate and only that return will be due the abatement and payment of which has been agreed upon (Section 65).

In a khula if the woman expressly forgoes maintenance for iddat it will abate, but the right of residence during iddat and children's maintenance will not abate even if it is so agreed upon (Section 66).

Whatever amount of return is agreed upon in khula will be lawful. However, to fix a return exceeding the amount of dower, or to take it, is undesirable (Section 67).

2. Mubaraat: Mubaraat means literally 'release' which also puts an end to matrimonial rights. According to Fath-ul Qadeer, mubaraat may come under the definition of khula.

Mubaraat is also a form of divorce by mutual consent of wife and the husband. Under mubaraat freedom could take place due to aversion on both sides and both sides are convinced that the marriage cannot go on, hence they mutually agree to separate. Proposal may come from either side and after acceptance it becomes (talaq-ul-bain) final.

It is the actual divorce by mutual consent. In this case, both the parties desire to have a separation. Offer may proceed from either of the parties. When the offer is accepted by the other party, the divorce is valid.

iv) Divorce by Judicial Process or Judicial Divorce

Judicial Divorce takes place by following means:

1. Ila.
2. Zihar.

3. Lian (Lien) or Mutual Imprecation.
4. Faskh and Tafrid.

1. Ila: Ila means a 'vow' or an 'oath'. Where a husband takes an oath to abstain from sexual intercourse with wife for more than four months (and not less), he makes an ila.

It is a kind of constructive divorce where wife acquires a right to get a judicial divorce. The vow in itself is not pronouncement of talaq by husband. The husband may revoke the oath by resumption of marital life.

The Shariat Act, 1937 recognized ila, along with talaq, lian, khula, mubaraat and zihar to obtain divorce.

Rules of Ila: The Law of Divorce (compiled by All India Muslim Personal Law Board in 'Compendium of Islamic Laws') in its Chapter 10 provides thus:

'If a man takes a vow not to cohabit with the wife for four months or more or for an unspecified duration, or subjects cohabitation to the condition of his doing something which is very difficult in itself, it is ila.

Explanation: Ila also takes effect by swearing not to cohabit with the wife, e.g. if one says 'By God, I will not cohabit with you for four months'. Similarly, subjecting cohabitation to performing an act which is usually very difficult also effects ila e.g. if one says 'if I cohabit with you it will be obligatory for me to perform Haj to observe fasts for a month', etc. However, if one mentions a condition fulfilling which is not usually very difficult, there will be no ila e.g. if one says, 'if I cohabit with you I will be obliged to say for rakats or namaz or fast for a day' (Section 57).

Conditions for effecting Ila:

i) Sanity and majority of the man effecting ila.
ii) The wife being married to the husband, in fact or in law, at the time of ila.

iii) If ila relates to a non-wife, making it dependent on the man's marriage to her.

iv) Not limiting non-cohabitation to a specified place, and

v) Not making exception of any day out of the four months.

Explanation:

a) If the husband is not sane and major, the ila by him will have no effect.

b) It is necessary for the validity of ila that it should relate to the woman married to the man in fact or in law. While being married in fact is clear; being married in law refers to a woman observing iddat after having been revocably divorced by the man. If the iddat prolongs to that the duration of ila expires before the iddat ends, an irrevocable divorce will be effective. There can be no ila relating to a woman who is observing iddat following an irrevocable divorce (leaving for no scope for a direct remarriage), since she is not married to the man either in fact or in law.

c) If somebody says to a woman 'If I marry you by God I will not cohabit with you for four months', ila will be effective as soon as the marriage takes place.

d) If a person tells the wife, 'By God I will not cohabit with you in that particular place', this will not be ila.

e) If someone tells his wife 'By God I will not cohabit with you for four months except one day, this will not be ila (Section 58).

Kinds of Ila: Ila is of two kinds, viz. temporary ila i.e. to vow against cohabitation with the wife for a fixed period (which should be at least four months).

In a temporary ila cohabitation within four months makes obligatory for the man either an expiation or the performance of the difficult action to which cohabitation was subjected by him. If there is no cohabitation for four months, at the expiry of this period an irrevocable talaq takes effect. In either case the ila will come to an end (Section 60).

In a permanent *ila* if the husband cohabits within four months expiation becomes obligatory and *ila* ends; and if he does not do so it will not end for the purposes of divorce. If now after halalah the man remarries her, non-cohabitation will not lead to a talaq but cohabitation will make expiation obligatory (Section 61).

2. Zihar: Zihar is a form of inchoate divorce. In zihar the husband swears that to him the wife is like 'the back of his mother'. If the husband compares his wife to his mother or any other female within prohibited degrees the wife has a right to refuse herself to him until he has performed penance. It he intends to revoke this declaration, he has to pay money by way of expiation, or fast for a certain period or feeding certain number of people. After the oath has been taken, the wife had the right to go to the Court and obtain divorce or restitution of conjugal rights on expiration.

'Zihar literally means position or joining back to back. In the Shariat, comparing the wife or any of her organs which may signify her whole being with women who are permanently in the prohibited degrees of marriage, or with any of their such organs to see which is absolutely prohibited is called zihar (Section 47).

3. Lian (Lien) or Mutual Imprecation: Meaning: Lian means imprecation. Divorce by mutual imprecation is mentioned in the Quran and is supported by the traditions of the prophet. It is reported that a man from the Ansar accused his wife of adultery. The prophet thereupon asked them both to take an oath; then ordered them to be separated from each other.

Islamic law provides very severe punishment to the offence of adultery (zina – sentencing through stoning to death in public. Quran condemns a false charge against chaste woman in general and against wife in particular. Husband who launches a false charge of adultery has to substantiate the charge through evidence otherwise he would be subjected to the punishment of 80 stripes under pure Islamic law.

4. Faskh and Tafrid : Meaning: The word 'faskh' means annulment or abrogation. It comes from a root which means 'to annul (a deed)' or 'to rescind (a bargain)'. In Muslim law, it refers

to the power of the Muslim Qazi to annul a marriage on the application of the wife. Faskh may be defined as 'The dissolution or rescission of the contract of marriage by judicial decree'. This is known as Tahkim in Fatimid law.

According to the Law of Divorce (Compiled by All India Muslim Personal Law Board in 'Compendium of Islamic Laws'. "Separation between the parties to a marriage may be effected for different reasons. Separation may be by the option of the husband, by the mutual consent of parties or by the decision of the qazi on the demand of the wife. The first situation is of talaq, the second of khula and the third of faskh.

The Dissolution of Muslim Marriage Act, 1939: Section 2 of the Dissolution of Muslim Marriage Act, 1939 provides for various grounds for the dissolution of marriage by woman as follows:

1. Absence of Husband.
2. Failure to provide Maintenance.
3. Imprisonment of Husband.
4. Failure to perform mutual obligations.
5. Impotency of the Husband.
6. Insanity of the Husband.
7. Repudiation of marriage.
8. Cruelty of the Husband; and
9. Any other ground, recognised by the Muslim Law.

1. Absence of Husband: If the husband's whereabouts are unknown for four years or more, wife can go for divorce. The decree comes into force after 6 months. During this period, if the husband appears and prepares to join matrimonial home, the Court may set aside the decree.

2. Failure to provide maintenance: If the husband fails to provide maintenance to his wife for two years or more, wife can go for divorce. Such failure to maintain may be wilful or due to poverty or any other reason.

3. Imprisonment of Husband: If the husband has been sentenced to imprisonment for 7 years or more, it is a ground for divorce by wife.

4. Failure to perform mutual obligations: If the husband fails to perform mutual obligations for a period of three years without reasonable cause, it is a ground for divorce.

5. Impotence of husband: Impotency means inability to have sexual intercourse. It is a ground for divorce. The decree is not operative if the husband satisfies within one year that he is potent.

6. Insanity of the husband: Insanity of husband for a period of two years is a good ground for divorce by wife. If the husband suffers from venereal disease, it is also a ground for divorce.

7. Repudiation of marriage: It means to avoid marriage. The wife is entitled to divorce by repudiation of marriage under the following instances:

(i) If the marriage has not been consummated.

(ii) If the marriage took place before she attained the age of 15 years.

(iii) If the marriage is repudiated before she attained the age of 18 years.

(iv) If the marriage of a minor girl is contracted by any guardian other than the father or father's father.

8. Cruelty of the husband: It includes both physical and mental ill-treatment by husband.

9. Any other ground: In addition to the above, any other ground recognised by Muslim Law.

10. MUSLIM DIVORCED WOMAN'S RIGHT TO MAINTENANCE

The term 'maintenance' has been used in a wide sense. It implies/ imposes an obligation to provide certain basic needs viz. food, clothing, shelter etc., without which a person cannot survive. (Section 3(b)

of the Hindu Adoptions and Maintenance Act, 1956 defines the term 'maintenance' as it includes:

i) in all cases, provision for food, clothing, residence, education and medical attendance and treatment, and

ii) in case of an unmarried daughter, it includes reasonable expenses of her marriage.

It is the duty of every person to maintain his wife, children and aged parents who are unable to live on their own.

Divorced wife's right of maintenance before the enactment of the Muslim women (protection of Rights on Divorce) Act, 1986:

After divorce, the wife is entitled to maintenance during the period of iddat. If the divorce is not communicated to her until after the expiry of that period, she is entitled to maintenance until she is informed of the divorce. A widow is not entitled to maintenance during the period of iddat consequent upon her husband's death.

Section 165 of Law of Marriage (compiled by All India Muslim Personal Law Board in 'compendium of Islamic Laws') provides that 'A woman observing 'iddat' is entitled to get maintenance; after 'iddat' she is a stranger and no maintenance for her after iddat obligatory for the divorcing man'.

Section 125 Cr.P.C was in force regarding the maintenance of a Muslim woman, equally with a Hindu woman. Section 125 of Cr.P.C. provides that the Husband is bound to provide maintenance to his wife, children (legal or illegal), and old aged parents. According to Section 125 Cr.P.C. the Muslim Woman is entitled to get the maintenance from her husband even after divorce, if she does, not remarry, and who is unable to maintain herself.

In *Tusliman Bibi v. Abdul Latif* [(1936) 63 Cal 726] it has been observed that the obligation of a husband to maintain his wife will cease on the completion of her iddat. A divorced wife is entitled to sue in the place where she normally resides for her dower, maintenance or return of her jewels and clothes.

In *Syed Mukhtar Ahmad v. Smt. Moonis Fatma* [(1981) 18 ACC 224], it has been observed that once the husband divorces the wife or the wife obtains a divorce from her husband, she becomes entitled to claim maintenance from her ex-husband provided she is unable to maintain herself and the husband has neglected to maintain her and her right to claim maintenance would come to an end only if she remarries or lives in adultery or if she voluntarily surrenders her right to maintenance.

Maintenance under Section 125 Cr.P.C.: Section 125 of the Code of Criminal Procedure, 1973, confers on married woman of any religion, right to claim maintenance from her husband, if he neglects or refuses to maintain her without any reasonable cause. It is a special provision and provides for speedy relief. It also extends to children and aged parents unable to live on their own.

According to this section, a married woman (wife) of any age or any religion who has been separated from her husband on reasonable cause and is not having sufficient means to live on her own is entitled to claim maintenance.

Conditions: To invoke relief (claim maintenance) under Section 125 Cr.P.C. by the married woman (wife) the following conditions are to be satisfied.

i) the marriage must be legally wedded marriage as per their religion;

ii) she must not refuse to live with her husband without reasonable cause;

iii) she must not be unchaste/live in adultery or remarried, and

iv) she must not live separately by mutual consent.

There is no period of limitation for filing an application under Section 125 Cr.P.C. The payment of maintenance comes into force with effect from the date of the order.

Application of Section 125 Cr.P.C. to Muslim Woman: The Code of Criminal Procedure is a territorial law and is applicable to all irrespective of their religion. Section 125 Cr.P.C. is a special

provision applicable to the married women of all religions including the Muslim woman. The Supreme Court upheld the maintenance under Section 125 Cr.P.C. to a Muslim women in a leading case detailed below:

Mohammed Ahmed Khan v. Shah Bano Begum, AIR 1985 SC 945 (popularly known as 'Shah Bano Case').

Facts of the case: Mohammed Ahmed Khan got married to Shah Bano Begum. 45 years after the marriage Ahmed Khan divorced Shah Bano Begum by pronouncing triple talak (i.e. Talak Talak Talak). Shah Bano filed a petition against her husband for maintenance under Section 125 Cr.P.C.

Judgment: The trial court and the Madhya Pradesh High Court upheld the petition by a Muslim woman, Shah Bano for maintenance on the ground that Section 125 Cr.P.C. is applicable to all including the Muslim women.

Ahmed Khan preferred an appeal before the Supreme Court contending that he had no obligation to pay maintenance beyond the IDDAT PERIOD. But, the Supreme Court did not admit his contention and upheld the maintenance to Shah Bano.

Issue/Principle: The issue involved in the instant case is, whether Section 125 Cr.P.C. is applicable to Muslim women also?

Section 125 Cr.P.C. is a general provision and is applicable to all irrespective of the religion and hence, the Supreme Court in the instant case upheld the maintenance to the Muslim woman.

However, the heads/leaders of the Muslim religion criticized that the Supreme Court through 125 Cr.P.C. interfered in Muslim Personal Law, and demanded to omit/amend Section 125 of Criminal Procedure Code. Later, Muslim Women (Protection of Rights on Divorce) Act, 1986 was passed to remove the above conflict/defect. The divorced Muslim wife's claims are now to be governed by the Act. The Act overrules Shah Bano's decisioin by Supreme Court. The Act also was subject to criticism as bad law. However, some High Courts allowed Muslim women to invoke maintenance under Section 125

Criminal Procedure Code as the Muslim spouses could opt to be governed by Section 125 Criminal Procedure Code as provided for in the Act.

Effect: The Muslim Women's (Protection of Rights on Divorce) Act, 1986 allows a Muslim woman to invoke relief under Section 125 Cr.P.C. only if the husband consents to it. As a consequence of the Act, the claim for maintenance was not entertained/allowed in *Md.Umar Khan v. Gulshan Begum*, (1992 Cr.L.J. 899 (M.P) on the ground that there was no consent by the husband to be governed by Sections 125 to 128 Cr.P.C.

Disqualifications: The wife is not entitled to claim maintenance under Section 125 Cr.P.C. if she:

i) refuses to live with the husband without reasonable cause;

ii) is a divorcee and is remarried;

iii) is living separately by mutual consent; and

iv) is living in adultery.

However, an unchaste wife is entitled to maintenance for her husband's child.

Questions and How to Answer

Q) Muta Marriage. (A.U. Model Q.P., Part-A, Q. 1 and S.V.U., Nov. 1999, Part-A, Q.1, Marks: 4).

Q) Give an account of law relating to Mahr. (A.U. Model Q.P., Part-B, Q. 2, Marks: 18).

Ans: Write about Muslim Law of marriage in brief (in a paragraph/one page and then write in detail, dower or Mahr).

Q) Iddat (S.V.U., Nov. 1999, Part-A, Q.7, Marks: 4).

Q) Give an account of the law relating to 'Talaq'? (S.V.U., Nov. 1999, Part-B, Q. 11, Marks: 18).

Ans: Write about the dissolution of Muslim marriage in brief. Name the three modes of dissolution and then write in detail about the first mode of Talak.

Part - II

Muslim Law of Inheritance (Muslim Intestate Succession)

Inheritance: Meaning and Definition: The expression 'Inheritance' is a concept related to property. The law of inheritance is a customary law, which deals with passing/transfer of property from dead person to living person/persons.

Definition of Inheritance: According to Section 1 of the Law of Inheritance compiled by All India Muslim Personal Law Board, 'What the relatives of a deceased person get without the consent or option of the deceased (propositus) in the estate i.e. the property or actionable claims left behind by him, is known in legal terminology as 'inheritance'.

When a Mohammedan dies leaving no will behind, the property devolves on his heirs. There are three classes of heirs viz. sharers, residuaries and distant kindreds. The shares are distributed as per koranic tables.

Ilm-ul-faraiz, the Muslim Law of Succession, which has been derived from the rules of succession to be found in the Quran, or in the Traditions, as well as from such of the pre-Islamic customs as well approved by the Prophet, is a great achievement of the Muslim Jurists (K.P.Saxena,Muslim Law, p.878) F.S.Tyabi observes:

'The Muslim Law inheritance has always been admired for its completeness as well as the success with which it has achieved the ambitious scheme of providing not merely for the selection of a single individual or homogeneous group of individuals, on whom the estate of the deceased should devolve by universal succession, but for adjusting the competitive claims of all the nearest relations.'

As to the excellence of the system in a formal sense, Sir William Jones has observed, 'I am strongly disposed to believe that no possible question could occur on the Muslim Law of Succession which might not be rapidly and correctly answered' (Jones, Works, VIII, 204).

The tribute paid to the system by Rumsey is not less exalted. He observes:

'The Mohammedan Law of inheritance comprises beyond question the most refined and elaborate system of rules for the devolution of property that is known to the civilized word' (Preface, p.1).

Muslims may be broadly divided into two sects, namely:

1) Sunnis; and 2) Shias. The Sunnis are governed by the Sunni Law and the Shias are governed by the Shia Law. The Sunnis are further divided into four sub-sects viz — i) the Hanafis; ii) the Malikis; iii) the Shafies; and iv) Hanabalies. Majority of the Sunnis are Hanafis and hence the Sunni Law is also known as Hanafi Law. In India, Mohammedan is presumed to be a sunni and is governed by the Sunni/ Hanafi Law.

The Muslim Law of inheritance is a different system of law. It does not recognise the joint family system. The distinction between family property and separate property does not exist. In Mohammedan law, the property of a deceased Muslim (propositus) devolves on his/ her heirs by succession. Whenever a female inherits property, she takes her share absolutely and without any restrictions. The heirs are entitled to specific shares as provided for in the koranic tables.

Prophet himself had given much importance to the Islamic law of inheritance and said, 'learn the law of inheritance, and teach them to the people; for they are one half of useful knowledge.'

The Islamic rules of inheritance have provided justice to all those who are going to be affected by heritable and testamentary dispositions.

The rules of Islamic inheritance are derived from:

i) Quran, which gives specific shares to certain relations.

ii) The residue of property goes to agnatic heirs and in their absence to uterine heirs.

iii) Bequests are limited to one third.

iv) Relations by affinity (husband and wife).

v) Ascendants are allowed to inherit along with descendants.

Subject to the provisions relating to succession and Administration of Estates, wills and Gifts and Marzul Maut, the whole of estate of a deceased Muslim devolves on the heirs at the particular moment of his death. The heirs inherit as tenants-in-common in respect of their pre-determined shares.

Application of the property of deceased Muslim: *Al-Sirajiyyah* says – 'There belongs to the property of a person deceased four successive duties to be performed by the Qazi: the first, his funeral ceremony and burial without superfluity of expense yet without deficiency; next the discharge of his just debts from the whole of his remaining effects; then, the payment of his legacies out of a third of what remains after his debts are paid; and lastly, the distribution of the residue among his successors, according to the Divine Book, to the Traditions and to the Assent of the Learned.'

The estate of deceased Muslim is to be applied according to the Indian Succession Act, in the following order:

i) Payment of his funeral expenses and death-bed charges (Section 320).

ii) Expenses of obtaining probate, letters of administration or succession certificates (Section 321).

iii) Wages due for services rendered to the deceased within 3 months next preceding his death by any labourer, artisan or domestic servant (Section 322).

iv) All debts of the deceased according to their respective priorities (Sections 323 and 325).

v) Legacies not exceeding 1/3rd of what remains after payments of item mentioned in (i) to (iv) above (Section 325).

vi) The residue is to be distributed among the heirs according to the law of the sect.

It is to be noted that the provisions of the Indian Succession Act prevail so far the claim to the property is concerned even if they come in conflict with Mohammedan Law.

Devolution of Inheritance: The residue that remains after the payment of the funeral and other expenses, debts and legacies, devolve, on heirs of the deceased at the moment of his death and the devolution is not suspended by reason merely of debts being due from the deceased. The heirs succeed to the estate as tenants-in-common in specific shares. Each heir is under the personal law liable to satisfy the debts of the deceased only to the extent of the share proportionate to his share in the estate. Where some of the co-sharers have paid the debts of the deceased, allowance should be made in regard to these payments at the time of partition.

It is therefore clear that the debt of the deceased gets divided in shares by operation of Muslim Personal Law among the heirs proportionate to their shares in the estate. The theory of sanctity of the integrity of the debt is foreign in the case of deceased Muslim leaving debt and some estate both being divisible amongst his heirs.

In *Jafri Begam v. Amir Muhammad Khan* (1885) ILR 7 All. 822, 843), it was said that Muhammadan heirs are independent owners of their specific sharers and if they take their shares subject to the charge of the debts of the deceased, their liabilities are in proportion to the extent of their shares.

Technical Terms: Following are some important terms:

1. Propositus: The deceased owner of property is called the propositus. If the propositus is a Sunni, Sunni law of Inheritance applies and if he is Shia, Shia law applies. In India the presumption is that a Mohomedan is a Sunni.

2. Spes Successionis: So long as a person is alive he has no heir. Heirship is only to a deceased owner. While the owner is alive, the person who would succeed to the property on his death is an heir apparent and his right is a chance of succession. Such an interest is not alienable. It is not heritable. The estate vests in an heir only at the time of the owner's death.

3. Child in womb: At the death of the propositus the heir may be in the womb. In such a case if the child is born alive it can take the property. If it is born alive, though it may die even a few minutes thereafter, its share will be set apart and that share will go to its heir. That is such an heir becomes a fresh stock of descent.

4. Agnate: An agnate is a person related to the deceased wholly through males.

Eg: son, son's son, son's son's son, son's daughter, son's son's daughter, father, father's mother, father's father's father, father's father's mother.

5. Cognates: A Cognate is a person related to the deceased through one or more females.

Eg: Daughter's son, daughter's daughter, Mother's father, Father's mother's father.

6. Collaterals: Collaterals are those, who are descendants in the parallel lines from a common ancestor or ancestress. They may be agnates or cognates.

Eg: Paternal aunt and paternal uncle are agnate collaterals. Similarly, maternal aunt and maternal uncle are cognate collaterals.

7. Illegitimate child: An illegitimate child can inherit only to its mother. It cannot inherit to its putative father or to the other children of the mother. Under Shia law the illegitimate child does not succeed even to the mother.

8. Step Children: If 'A's mother becomes a widow and then remarries, 'A' has no right of inheritance to the stepfather and vice-versa.

9. True Grandfather: He is a male ancestor between whom and the deceased no female intervenes.

Eg: Father's father, Father's father's father.

10. False Grandfather: He is a male ancestor between whom and the deceased, a female intervenes.

Eg: Mother's father, Mother's mother's father, Mother's father's father.

11. True Grandmother: She is a female ancestor between whom and the deceased, no false grandfather intervenes.

Eg: Father's mother, Mother's mother, Father's mother's mother.

12. False Grandmother: She is a female ancestor between whom and the deceased, a false grandfather intervenes.

Eg: Mother's father's mother.

13. h.h.s: How high so ever.

14. h.l.s: How low so ever.

15. Heritable Property: The property, which is the subject matter of the inheritance, should be one owned by the propositus at the time of his death.

16. Homicide: Prophet had said only these words – 'there is no inheritance for a murderer. Quran in Sura 4 says that intentional murder is one of the great sins, except where it was committed by mistake.

Under the Sunni Law, a person who has caused the death of another, whether intentionally or by mistake, negligence, or accident, is debarred from succeeding to the estate of that other.

Eg: If 'A' kills 'B', he cannot inherit to 'B'. This is the Sunni law. Shia law excludes 'A' only if he killed intentionally.

17. Religion: A non-Muslim cannot inherit from a Muslim.

18. Slavery: Under the Mohammedan law a slave cannot succeed. Now slavery has been either abolished or has no place in Mohammedan Law as is administered in India. The bar of slavery has been abolished by the Abolition of Slavery Act, 1943.

Lecture - II
Hanafi Law of Inheritance

According to Sunni/Hanafi law, the heritable property first goes to the relations of the deceased who on the basis of their preferential claim. Under Hanafi Law, the heirs of a deceased Muslim, male or female fall under the following categories:

1. The Sharers (Class I : Quranic Heirs-Dawul-Furad).
2. The Residuaries (Class II : Agnatic Heirs-Asabat).
3. The Distant Kindred (Class III : Uterine Heirs-Dhawul-arham), and
4. The State by Escheat.

When a Muslim, male or female dies intestate, his/her property devolves first upon the sharers. According to Koranic tables, the sharers are entitled to specific shares viz. 1/2, 1/3, 1/6, 1/8 etc. After allotment of the respective/specified shares to the sharers, residue (ie. the remaining property) if any is distributed among the 'Residuaries'. In case, there are no residuaries, the residue goes back/returned to the sharers for redistribution. In the absence of both the sharers and residuaries, the property of the deceased passes to the other relations called 'the distant kindred'. In the absence of the sharers, residuaries and distant kindred, the property/estate of the deceased goes to the state by escheat.

1. THE SHARERS

They are the relations whose share have been specifically fixed by Quran. A sharer means who has been provided a share by Quran. They are also called 'Ashab-al-Faraiz'. Quranic heirs are the heirs whose shares are fixed by the Holy Quran. Traditions of the Prophet or Consensus of the Community, and are to be paid their shares first out of the deceased person's death. Sharers are 12 in number and are entitled to specified shares as per the koranic tables. However, some sharers do not inherit as sharers, if a residuary of equal rank co-exists. Such sharers inherit as residuaries and are called the 'Koranic Residuaries'.

The Table showing the sharers and their respective shares according to the Koranic Tables is given below:

Table showing sharers and their specified shares:

Sl. No.	Shares	One Heir	Two or More Than two	Conditions under which the normal share is Inherited	Variation of shares
1.	Husband	1/4	–	In presence of a child or child of a son how low soever.	1/2 in the absence of a child or child of a son how low soever.
2.	Wife	1/8	1/8	In presence of a child or child of a son how low soever.	¼, in absence of a child or child of a son how low soever.
3.	Daughter	½	2/3	In absence of son	In presence of a son she becomes a residuary.
4.	Father	1/6	–	In presence of a child or child of a son how low soever	In absence of a child or child of a son how low soever, the father inherits as a residuary.
5.	Mother	1/6	–	In presence of a child or child of a son how low soever, or two or more brothers or sisters, or even one full, consanguine or uterine brother and one such sister	1/3 in absence of a child or child of a son how low soever and not more than one brother or sister (if any); but if the wife or husband and the father, is also present they only 1/3 of what remains after deducting the scheme of the spouse.

6.	True Grand-father	1/6	–	In presence of a child or child of a son how low soever, and in absence of the father or a nearer true grandfather	In absence of a child or child of a son how low soever, the true grandfather inherits as a residuary, provided there is no father or nearer true grandfather.
7.	True Grand-mother	1/6	1/6	A maternal true grand-mother takes in absence of a mother, and a nearer true grandmother and a paternal true grandmother takes in absence of a mother, father, a nearer true grandmother and an intermediate true grand-father.	
8.	Son's Daughter how low soever	1/2	2/3	In absence of a son, daughter, a higher son's son, higher son's daughter, or an equal son's son	In absence of a son, higher son's son, or an equal son's son and when there is only one daughter, or higher son's daughter will take ½ and the son's daughter how low so ever (whether one or more) will take 1/6.

8(i)	Son's Daughter	½	2/3	In absence of a son, daughter or son's son	In absence of a son, or son's son and in presence of only one daughter, the son's daughter (whether one or more) will take 1/6. (In presence of a son's son she becomes a residuary).
8(ii)	Son's son's daughter	½	2/3	In absence of a son, daughter, son's son, son's daughter, or a son's son's son	In absence of a son, son's son or son's son's son and in presence of only one daughter, or son's daughter, the son's daughter, the son's son's daughter (whether one or more) will take 1/6 (In presence of a son's son's son she becomes a residuary.
9.	Uterine Brother, Uterine sister	1/6	1/3	In absence of a child, child of a son how low so ever, father or true grandfather	
10.	Full Sister	½	2/3	In absence of a child, child of a son how low so ever, father, true grandfather, or full brother	In presence of a full brother she becomes a residuary.

11.	Consang-uine sister	½	2/3	In absence of a child, child of a son how low soever, father, true grandfather, full brother full sister, or consanguine brother	When there is only one full sister and she succeeds as a sharer, the consanguine sister (whether one or more) will take 1/6l, if she is not otherwise excluded (with consanguine brother she becomes a residuary).

2. THE RESIDUARIES

Residuaries are Class II heirs, who succeed to the residue, if any, left after satisfying the shares. They don't get any mixed share; it varies according to the residue. A sharer means who has been provided a share by Quran. They are also called 'Ashab-al-Faraiz'. Quranic heirs are the heirs whose shares are fixed by the Holy Quran. Traditions of the Prophet or Consensus of the Community, and are to be paid their shares first out of the deceased person's death. Agnates means a person whose relation to deceased can be traced without intervention of female link. Agnatic heirs are the heirs who are specified as such in the Quran or the Hadith but not with any fixed shares of the Quranic heirs, or in their absence inherit the full estate.

The term 'residue' means "the remainder or the remaining, after taking away a part of it". Residuaries are those relations of the deceased, who take/share the residue from the estate of the deceased after allotting specified shares to the sharers. If there are no sharers, the whole property/estate is shared/distributed among the residuaries. The residuaries may be classified into:

i) Descendants;

Eg: Son, Son's son how low soever (h.l.s).

ii) Ascendants;

Eg: the father, the true grandfather; and

iii) Collaterals or the Descendants of the father.

Eg: Full brother, full sister, full brother's son etc.

(Full mother or full sister means "born to the same father and mother i.e. own brother/sister).

The table showing the portions/shares of the property/estate of the deceased Muslim intestate is given below:

Table showing the shares/portions distributed among Residuaries

Heirs	When portion of estate they take
Descendants	
1. Son	a) when there is a daughter, he takes double portion. b) when there is no daughter, he takes the entire residue.
2. Son's son	a) when there is son's daughter, he takes how so ever double portion. (When there is equal son's son, but there is a lower son's son's daughter, if she does not inherit as a sharer, inherits as residuary with lower son's son). b) nearer son's son excludes remoter. c) two or more son's sons take the estate in equal shares.
Ascendants	
3. Father	As a residuary he takes the entire estate.
4. True Grandfather	a) As a residuary he takes the entire estate. b) The near true grandfather excludes the remoter.

Collaterals Descendants of the father

5.	Full brother	a) where there co-exists a full sister, he takes double portion. b) In the absence of the sister, he takes the entire residue.
6.	Full sister	In the absence of the full brother and aforesaid residuaries, she takes the residue, if any, if there is/are daughter/ daughters or son's daughter/daughters how low so ever or one daughter/ daughters, how low so ever.
7.	Consanguine brother	When there is consanguine sister, he takes double portion.
8.	Consanguine sister	In default of a consanguine brother and above-mentioned residuaries she takes the residue, if any, if there be daughter/ daughters or a son's daughter/daughters how low so ever or one daughter and a son's daughter/daughters how low so ever.
9.	Full brother's son	In the default of above residuaries he takes the entire residue.
10.	Consanguine brother's son	In the default of above residuaries he takes the entire residue.
11.	Full brother's son's son	In default of the above residuaries he takes the entire residue.
12.	Consanguine brother's son's	In default of the above residuaries son he takes the entireresidue.

Then come the male descendants of brother's son's son, and then the male descendants of consanguine brother's son's son alternatively.

Descendants of the true grandfather

13.	Full paternal uncle.	He takes the entire residue.
14.	Consanguine paternal uncle.	He takes the entire residue.
15.	Full paternal uncle's son.	He takes the entire residue.
16.	Consanguine paternal uncle's son.	He takes the entire residue.
17.	Full paternal uncle's son's son.	He takes the entire residue.
18.	Consanguine paternal uncle's son's son.	He takes the entire residue.

After them come the remoter male descendants of full paternal uncle's son's son and consanguine paternal uncle's son's son's son alternatively.

Then come the descendants of the remoter true grandfathers, in like order and manner as the deceased paternal uncles and their sons and son's sons.

3. DISTANT KINDRED

Distant Kindreds are Class III heirs of the deceased Muslim intestate, who are neither sharers nor residuaries. Uterine Heirs are the deceased person's relatives not being his Quranic or agnatic heirs and become his heirs if the deceased has left behind no Quranic or agnatic heir, or none of them except the surviving spouse.

The term distant means "remote or great distance or great space", and the term `kindred' means "relationship by blood or marriage". Therefore, the expression `Distant kindred' collectively means "distant relation". In Muslim Law, distant kindred, is a relation of the deceased, who is neither a sharer nor a residuary. They are — (a) female agnates; and (b) female cognates both males and females. For the purpose

of distribution of the property/estate of the deceased, distant kindred are classified as follows:

i) Descendants of the deceased.

Eg: Daughter's children and their descendants h.l.s;

Son's daughter's children h.l.s; and their children without any limit.

ii) Ascendants of the deceased.

Eg: False grandfather h.h.s. and false grandmother h.h.s.

iii) Collaterals.

Eg: Full brother's daughters and their descendants.

The distant kindred succeed to the estate of the deceased only in the absence of the shares and residuaries with one exception. Where husband or wife is the sole heir, then the distant kindred take the residue.

4. THE STATE OF ESCHEAT

The State as an Heir by Escheat, takes the property of an heirless person. In other words, in the absence of the Shares, Residuaries and distant kindred, the property goes to the State.

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Lecture - III
The Doctrine of Aul and the Doctrine of Radd

Introduction: According to Hanafi Law of Inheritance, three types of heirs are recognised. They are:

1. Sharers;

2. Residuaries; and

3. Distant Kindred.

1. SHARERS: Sharers are the nearest relations/heirs, who are entitled to distribute/share first, the property/estate of a Muslim dying intestate. They are 12 in number and are entitled to specified shares as per the koranic tables as stated hereunder:

1. Wife: 1/8 share. (If there are two or more wives : 1/8 share. The share increases to 1/4, when there is no child or child of a son h.l.s.)

2. Husband: 1/4. (The share increases to 1/2 if there is no child or child of a son.)

3. Daughter: 1/2. (The share is reduced to 2/3 if there are two more daughters).

4. Son's daughter: 1/2. (2/3 if two or more).

5. Full Sister: 1/2. (2/3 if two or more).

6. Consanguine sister: 1/2. (2/3 if two or more).

7. Uterine brother: 1/6. (1/3 if two or more).

8. Uterine sister: 1/6. (1/3 if two or more).

9. Mother: 1/6.

10. Grandmother: (Maternal or paternal h.h.s):- 1/6.

11. Father: 1/6. and

12. True Grandfather: 1/6.

2. RESIDUARIES: Residuaries are those relations of the deceased, who take the remaining property after allotting specified

shares to the Sharers. If there are no sharers, the entire property goes to the residuaries.

Eg: Son's son's son; Father; Grandfather; Full Brother; Full Sister etc.

3. DISTANT KINDRED: Distant Kindred are those who are neither sharers nor residuaries. They are termed as Uterine Heirs. They succeed to the estate of the deceased only in the absence of the sharers and residuaries.

In the absence of the sharers, residuaries and distant kindred, the estate/property of the deceased goes to the State Government by 'Escheat'.

1. THE DOCTRINE OF AUL (INCREASE)

When a Muslim dies intestate (without testament/will) leaving sharers alone, the property is distributed among the sharers according to the Koranic tables. Sometimes, such distribution may result in two anamolous situations namely;

1. The allotted property as per the Koranic Tables may be more than the real property (i.e. the property left behind); or

2. The allotted property under the Koranic Tables may be less than the real property.

In such situations, shares of the sharers are to be adjusted against the denominator of the share by increasing the denominator (Doctrine of Aul) or reducing the denominator by returning the residual (remaining) share to the sharers (Doctrine of Radd).

The Doctrine of Aul speaks about the first situation in which cases arise in which the total shares of the sharers exceed the heritable property. What is done in these cases is to decrease the shares proportionately. There is nothing difficult about this principle except its very name which seems quite contrary to its effect. Because what is done is to decrease the shares while, the name is the Doctrine of Increase. The doctrine may be illustrated as given below:

Husband	1/4 = 3/12	reduced to	3/13
Mother	1/6 = 2/12	reduced to	2/13
2 daughters	2/13 = 8/12	reduced to	8/13
	13/12		13/13 = 1

In this above illustration the sum total of 1/4, 1/6 and 2/3 exceeds the unity. The fractions are therefore reduced to a common denominator, which in this case is 12. The sum of the numerators is 13 and the process consists in substituting 13 for 12 as the denominator of the fraction 3/12, 2/12 and 8/12. By so doing the total of the shares equals unity. The doctrine of 'increase' is so called because it is by increasing the denominator from 12 to 13 that the sum total of the shares is made equal to unity.

The following illustration further explains on the doctrine of Aul:

Illustration: P dies leaving behind his mother M; Father F; Widow W and 3 daughters D1, D2, and D3. According to the Koranic Tables, the shares allotted to them as sharers are 1/6, 1/6, 1/8 and 2/3 respectively. The total comes to 27/24 (1/6 + 1/6 + 1/8 + 2/3 = 27/24). In this example, numerator i.e. 27 indicates Units of property to be distributed. The denominator i.e. 24 indicates the Units of Property available for distribution (actual property). To adjust this excess, the doctrine of Aul is applied by increasing the denominator as follows:

Diagram

M F

(P) W

D1 D2 D3

	Heirs (Sharers)	Adjusted to Common Denominator	Reduced To
M	1/6	4/24	4/27
F	1/6	4/24	4/27
W	1/8	3/24	3/27
3D	2/3	16/24	16/27
	27/24		27/27

As stated above, the property to be distributed is more (i.e. 27 Units), while the property available in hand for distribution is less (i.e. 24 Units). In order to distribute the property available among the above shares, their respective shares are adjusted by increasing the denominator as shown in the above table. Thus, equitable distribution of property among the sharers could be possible by applying the Doctrine of Aul.

2. THE DOCTRINE OF RADD (= RETURN)

When a Muslim dies intestate (without testament/will) leaving sharers alone, the property is distributed among the sharers according to the Koranic tables. Sometimes, such distribution may result in two anamolous situations namely;

1. The allotted property as per the Koranic Tables may be more than the real property (i.e. the property left behind); or

2. The allotted property under the Koranic Tables may be less than the real property.

In such situations, shares of the sharers are to be adjusted against the denominator of the share by increasing the denominator (Doctrine of Aul) or reducing the denominator by returning the residual (remaining) share to the sharers (Doctrine of Radd).

The Doctrine of Radd speaks about the second situation stated above. Sometimes, the shares allotted to the sharers according to the koranic tables may be less than the property available. (i.e. the real property or the property left behind). In other words, the property to be distributed is less and the property available is more. In this case, some property is left behind (residue) after allotment of the specified shares to the sharers. The residue (remaining property) generally goes to next class heirs viz. residuaries. If there are no residuaries, it (the residual property) is returned to the sharers. Such return is called 'Radd' or the 'Doctrine of Radd'.

In Arabic, the Doctrine is known as Rudd. If the total share of all the sharers is less than the heritable property, the residue goes to the heirs of the class of the residuaries but, if there be no residuary,

the residue will not go to the distant kindreds but would return to the sharers and would be distributed among them proportionately.

In order to adjust such surplus property returned, among the same sharers equitably, the Doctrine of Radd is applied.

Under the Doctrine of Radd (Return), the shares of the sharers are to be increased proportionately. For this purpose, the denominators of the respective shares of sharers are to be reduced to equalise the total denominator with the total numerator. The illustration given below clearly explains on this point:

Illustration: P dies leaving behind him, his mother M, and daughter D. According to the Koranic Tables M gets 1/6 and daughter gets 1/2. The total comes to 1/6 + 1/2 = 1+3/6 = 4/6. In this illustration, numerator 4 indicates the Units of Property to be distributed; while the denominator, 6 indicates the Units of Property available. To equalise this as 4/4, applying the doctrine of Radd the shares of M and D are to be readjusted by increasing their shares proportionately by reducing the respective denominators.

Diagram

M	(P)	=	Deceased
(P)	M	=	Mother
D	D	=	Daughter

	Heirs	Adjusted to Common Denominator	Increased To
M	1/6	1/6	1/4
D	1/2	3/6	3/4
	4/6		4/4

As shown in the above table, the shares of M and D are 1/6 and 1/2 respectively. To make the denominator common, the shares are converted into 1/6 and 3/6. The total is 1/6 + 3/6 = 4/6. Now,

the numerator is 4 and denominator is 6 i.e. 2 units more than the denominator. In order to equalise the denominators, they are reduced by 2 i.e. 1/6 is converted to 1/4 and 3/6 is converted to 3/4 so as to arrive at 4/4 (1/4 + 3/4 = 4/4).

Thus, by applying the doctrines of AUL and RADD the property of inheritance can be readjusted against the shares of the sharers, when there are no residuaries, so that the inconsistency as a consequence of the shares under the Koranic Tables is removed.

Lecture - IV
The Shia Law of Inheritance

Under Shia Law, succession to the property of a Muslim dying intestate is based on two principles namely: 1) Nasab or blood relationship; and 2) Sabab or Special Clause. The Nasab is sub-divided into two classes viz. i) dhu fard, the koranic heirs or sharers; and ii) dhu quarabt or blood relations. Similarly, the Sabab also is sub-divided into two classes viz. i) Zawjiyyat or status of a spouse; and ii) Wala or Special legal relationship.

The principles of the Ithna Ashari Shiite law – commonly known as 'shia law' in India. The principles of shia law of inheritance are very different from the principles of Hanafi (sunni) law.

Classification of heirs: Unlike Sunni Law, Shia Law divides the heirs on two grounds:

1. Heirs by consanguinity (Nasab), that is blood relationship; and
2. Heirs by special cause (Sabab), that is heirs by marriage husband and wife.

1. Heirs by consanguinity: Heirs by consanguinity (Nasab)are divided into three classes and each class is sub-divided into two sections.

Class I - i) Parents.

ii) Children and other lineal descendants how low soever.

Class II- i) Grandparents (true or false) how highsoever.

ii) Brothers and sisters and their descendants how low soever.

Class III- i) Paternal, and

ii) Maternal uncles and aunts of the deceased, and of his parents and grand parents how highsoever, and their descendants how lowsoever.

Class I excludes class I and Class II excludes class III. But the heirs of different sections within a class inherit together and do not exclude each other. However, the nearer degree in each section excludes the more remote in that section.

2. Heirs by Special cause: The heirs by special cause may be divided into two kinds.

i) Heirs by marriage (Zoujiyat), that is, husband and wife.

ii) Heirs by special relationship (Wala).

It should be noted, that the heirs by special (legal) relationship are not recognized in India. However originally they were such persons who acquired the right of inheritance by virtue of spiritual headship, or delicts committed by the deceased or emancipation.

Principles or Rules of Succession under Shia Law:

1. For the purposes of succession the Shia Law divides heirs into three classes. Class I excludes the Class II. Class II excludes the Class III heirs.

2. There are two groups in each of classes I, II and III. The claimants of the two groups succeed together. If there are heirs in two groups of the class, then the heirs of two groups will succeed together.

3. In each section there can be various heirs e.g. in Section II of Group I, there can be a son and a son's son. The question arises as to who will then inherit. The rule in this connection is that the nearer in degree in each section will exclude the more remote in that section.

4. The descendants get per stripes, i.e. according to the branch.

5. Heirs by marriage i.e. husband or wife, are never excluded from the inheritance, but inherit together with the nearest heir by consanguinity according to the rules laid down.

6. If the deceased left only one heir, the whole property would be devolved upon the heir, except in the case of a wife. If the deceased left a wife but no other heir, the older view was that the wife will

take her share ¼ and the surplus will escheat to the state. The rule now in force is that the widow is entitled in the absence of blood relations, to the whole estate by return.

7. The Shia law recognized a limit principles of representation in calculating the shares of the sharers as distinguished from the Sunni mode of calculating the shares.

Principles or Rules of succession among heirs of the first class: The persons who are entitled to succeed to the estate of Shia Muslim are the heirs of the first class along with the husband or wife if any. The first class of heirs comprises father, mother, children and in the absence of children, remote descendants. The shares are the same as in Hanafi law. In the absence of any descendants, the parents will take the whole estate, the mother taking 1/3 as a sharer and the father, the remaining (2/3) as a residuary.

For example, if a Shia Muslim dies leaving a wife, mother and father as his heirs. Then the wife will get ¼ share as sharer; the mother will get 1/3 share as sharer and the father will get the remaining 5/12 share as residuary.

Principles of Rules of Succession among heirs of the second class: They comprise grand parents how high soever and brother and sister and their descendants how low soever. The rules of succession among the heirs of the second class are as follows:

1. Grand parents how high soever without brothers and sisters or their descendants how low soever.
2. Brothers and sisters or their descendants without grand parents or remote ancestors.
3. Grand parents how high soever with brothers and sisters (or their descendants).

    a) If there are grand parents without brothers and sisters or their descendants, the paternal grand parents take 2/3 and divide it between them according to the rule of a double share to the male and the maternal grand parents take 1/3, and divide it equally between them

so that the mother's father take 1/6 and the mother 1/6.

b) In the case of brothers and sisters of various kinds without grand parents, the estate (minus the share of the husband or wife) will be distributed among them according to the same rule as in Hanafi law.

c) In the case of grand parents with brothers and sisters, the estate (minus the share of the husband or wife) is to be distributed among grand parents and brothers and sisters according to the following rules:

i) A paternal grand father counts as a full consanguine brother and a paternal grandmother counts as a full consanguine sister.

ii) A maternal grand father counts as a uterine brother, and a maternal grand mother counts as a uterine sister. Thereafter, the estate will be divided as among brothers and sisters of various kinds as under Hanafi law.

Principles or Rules of Succession among heirs of the third class: If there are no heirs of the first or second class, the estate (minus the share of husband or wife) devolves upon the heirs of the third class in the order given below:

1. Paternal and maternal uncles and aunts of the deceased; failing then their descendants how low soever, the nearer in degree excluding the more remote.
2. Paternal and maternal uncles and aunts of the parents; failing then their descendants how low soever, the nearer in degree excluding the more remote.
3. Paternal and maternal uncles and aunts of the grand parents and their descendants how low soever in like manner, the nearer excluding the more remote.

Exception: There is one exception to the noted among the heirs belonging to the third class, and that is where the only claimants are:

i) the son of a paternal uncle, and

ii) a consanguine paternal uncle;

the son of the paternal uncle, though he is remoter in degree to the consanguine paternal uncle, excludes the latter who is nearer in relationship to the deceased. The reason is that the shias are the followers of Ali, who was the paternal uncle's son of the Prophet. At the time of his death, the prophet has also left his consanguine paternal uncle named Abbas. The shias maintain that on the death of the prophet, the succession to the Caliphate should have gone first to Ali, on the ground that he was the nearest male heir of the prophet. But Ali could not be the nearest male heir, unless the son of the paternal uncle was entitled to succeed in preference to the consanguine paternal uncle of the prophet, Abbas. Therefore, to uphold the claim of Ali, the Shias had to resort to this illogical reasoning that the son of full paternal uncle is entitled to succeed in preference to the consanguine paternal uncle, and this accounts for the exception.

Principles for Allotment of shares under Shia Law: After determining the persons who are entitled to succeed to the property of the deceased in accordance with the above mentioned Rules, the next problem that comes up for a solution is the allotment of shares i.e. which heir will get what amount of shares. So, the rules regarding the allotment of shares are as follows:

1. The first step is to determine the heirs, who are entitled to succeed to the property of the deceased. For the purpose of determining the shares, the heirs are divided into two classes i.e. sharers and Residuaries. There is no class of distant kindred under Shia Law.
2. The next step is to allot the shares, and determine which heir will get what amount of shares. Shares of the sharers together with the condition governing their allotment is given in the table that follow.
3. The husband or wife is never excluded from the inheritance.

4. The heirs who are not sharers are Residuaries; they are not entitled to any fixed share in the property. They are residue (what is left).

5. The division is per stripe i.e. in each of the three groups of heirs by consanguinity, the descendants get per stripe or according to the branch.

Table of sharers under Shia Law

Sl. No.	Shares	Share of one Heir	Share of two or more collectively	Condition under which the share is inherited	Shares as varied by special circumstances
1.	Husband	¼	—	When there is a lineal descendant.	½, when no such descendant.
2.	Wife	1/8	1/8	When there is a lineal descendant.	¼, when no such descendant.
3.	Father	1/6	2/3	When there is a lineal descendant.	If there be no lineal descendant, the father inherits as a residuary.
4.	Mother	1/6	—	a) When there is a lineal descendant or; b) where there are two or more full or consanguine brothers or one such brother and two such sisters or four such sisters, with the father.	1/3rd in other cases
5.	Daughter	1/6	2/3	When no son	With the son, she takes as a residuary.

6.	Uterine brother	1/3	—	When no parent or linear descendant	—
7.	Uterine sister	1/6	1/3	When no parent or lineal descendant.	—
8.	Full Sister	½	2/3	When no parent or linear descendant, or full brother, or father's father.	The full sister takes a residuary with the full brother and also with the father's father.
9.	Consang-uine sister	½	2/3	When no parent or linear descendant, or full brother or sister, or consanguine brother or father's father.	The consanguine sister takes as a residuary with the consanguine brother and also with the father's father.

Note: The descendants how low – soever of sharers are also sharers as 'son is not included in the list of Quranic heirs though 'son' includes in the expression 'children', some argue that he is entitled double to daughter as the Quran says 'to the male a portion equal to that of two females' (Quran Sura 4 : Aayat 11) Under law son is considered as a Quaranic heir and not a residuary.

The heirs in an earlier group exclude the heirs in the later group. Heirs in both the categories of a group inherit simultaneously.

III) State by escheat.

For the purpose of distribution of property of the deceased, the heirs under Shia Law are as follows:

i) The Shares and their descendants h.l.s: The sharers are nine in number viz. 1. Husband (1/4), 2. Wife (1/6), 3. Father (1/6), 4. Mother (1/6), 5. Daughter (1/2)&(2/3 if two or more), 6. Uterine brother (1/6 and 1/3), 7. Uterine sister (1/6 and 1/3), 8. Full sister (1/2 and 2/3) and 9. Consanguine sister (1/2 and 2/3).

ii) The residuaries and their descendants h.l.s: The residuaries are those, who are not the sharers. They are not entitled to any specific share (like the sharers). They get only the residue if any after the allotment of specific shares to the sharers. Four sharers viz. Father, daughter, full sister and consanguine sister inherit some times as residuaries also.

The Shia Law does not recognise distant kindred. In the absence of sharers, the whole property of the deceased goes to the residuaries. In the absence of both the sharers and residuaries, the property goes to the State by Escheat.

Difference between the Muslim Law and Hindu Law of Inheritance and Succession:

Muslim Law of Inheritance	Hindu Law of Inheritance
1. Muslim Law does not recognize survivorship.	Hindu Law recognize survivorship which is an incident of a coparcenary governed by the Mitakshara Law.
2. The Muslim Law makes no difference between the ancestral and self acquired property for purpose of inheritance.	The Hindu Law differenciates the ancestral and self acquired property for purpose of inheritance.
3. The Sunni Law does not recognize the Right of Representation.	The Hindu Law recognizes the Right of Representation in the case of sons, grandsons and great-grand-sons.
4. The rule of a male getting double the share of a female of the same degree is peculiar to the Mohammedan Law.	The share of a female in the property is unknown in ancient Hindu Law (Mitakshara) but allowed equal share under Hindu Succession Act, 1956.
5. Under the Mohammedan Law female's right to inherit property is absolute with full powers of disposal like any other male heir.	Under the Orthodox Hindu Law the female got a life estate in most cases. The law has since been modified by the Hindu Succession Act, 1956.

6. Under Mohammedan Law, a son does not exclude father, mother and daughter.	Under the Orthodox Hindu Law a son excludes father, mother and daughter. Under the Hindu Succession Act 1956, the conditions are changed.
7. Under the Mohammedan Law females are not excluded by males but succeeded with them.	Formerly in Hindu Law males generally excluded females. This is not now under the Hindu Succession Act, 1956.
8. Under the Mohammedan Law the heirship is determined on the basis of Nasab, Sabab and Wala.	Under Mitakshara Law, consanguinity or blood relationship and on the basis of capacity to confer spiritual benefits also.
9. Under the Muslim Law, unchastity is not a ground for exclusion from inheritance.	Under the Hindu Law unchastity of the wife disqualifies her from inheritance.
10. Among Shias a female does not inherit from her illegitimate sons.	Among Hindus, a female does inherit from her illegitimate sons.

Distinction between Sunni (Hanafi) Law and Shia Law of inheritance

Sunni (Hanafi) Law	Shia Law
1. There are three classes of heirs viz. 1. Sharers; 2. Residuaries; and 3. Distant kindred.	1. Shia Law does not recognise distant kindred and hence, there are two classes of heirs viz. 1. Sharers; and 2. Residuaries.
2. Shares exclude residuaries and residuaries exclude distant kindreds.	2. Shares and residuaries are together divided into three Classes in an order of preference.
3. The principle/doctrine of Primogeniture (i.e. first born) is not recognized in Sunni Law.	3. The shia law recognizes the doctrine of primogeniture. Thus the eldest son is entitled to his deceased Father's sword, wearing apparel and Quran.

4. The principle of consanguinity is not recognized in sunni Law. The sunnis prefer agnates to cognates.	4. The shia law adopts the principle of consanguinity and not of agnacy. the shias prefer the nearest kinsmen whether they are agnates or cognates.
5. Sharers are twelve in number.	5. Sharers are nine in number.
6. There is no distinction between movable and immovable property.	6. Such distinction exists and a childless widow cannot take any share in the immovable property.
7. An illegitimate child has a right to inherit the property of his mother and can not inherit the property of his father.	7. An illegitimate child has a right to inherit the property of both his father and mother.
8. The doctrine of Aul is applicable to all the sharers.	8. It applies only to the daughter and sister of the deceased intestate.

QUESTIONS AND HOW TO ANSWER

Q) Doctrine of Aul (N.U, April, 1999, Part-A, Q.10, Marks:4).

Ans: Write about the Doctrine of Aul in brief i.e. in a paragraph/ one page.

Q) Sharers. (S.V.U, November, 1999, Part-A, Q.6, Marks: 4).

Ans: When a Muslim dies intestate, his/her property devolves first on sharers. Write now about sharers in brief.

Q) Doctrine of Return Under Muslim Law. (Marks: 4).

Ans: Write about the Doctrine of Radd in brief.

Q) Explain with illustration the Doctrine of 'AUL' under Muslim Law. (A.U, August 2001, Part-B, Q.2, Marks: 18).

Ans: Write about Sunni/Hanafi Law of inheritance in brief (one paragraph/page) explain the doctrine of Radd in brief and AUL in detail with illustration.

Q) Explain the salient features of Sunni Law of inheritance.

Ans: Write in detail about Sunni/Hanafi law of inheritance explaining in brief about sharers, residuaries and distant kindred.

Part - III
Law of Wills
(Testamentary Succession)

When a person dies intestate i.e. dies after executing a will (testate/testament) the law applies is, 'testamentary succession'. Will or Testament is a declaration by the owner of the property as to how his/her property is to be disposed of after his/her death. A will or testament will come into force after the death of the testator and is revocable before the death of the testator.

This part of the subject, Law of Wills deals with 'Testamentary Succession' of Muslims and Non-Muslims i.e. Hindus, Christians and others. The provisions relating to Non-Muslim wills are contained in Indian Succession Act, 1925. This part covers the following topics:

1. Muslim Will (Wasiyyat)

   (Muslim Testamentary Succession).
2. Non-Muslim Will (Testamentary Succession of Hindus, Christians and others: Chapters 4 to 14 of the Indian Succession Act, 1925).
3. Probate and Letters of Administration.
4. Succession Certificate.
5. The doctrine of Cypress, and
6. Waqf.

Lecture - V
Muslim Will (Wasiyyat)
(Law of Wills in Muslim Law or Muslim Testamentary Succession)

Introduction: When a person dies his/her property devolves upon his/her heirs. A person may die with or without a will (Testament). If a person dies leaving a will i.e. dies intestate, the property is distributed among his/her heirs according to the contents of will subject to rules of Testamentary Succession. In other words, the property is distributed as per the contents of the testament or will. On the other hand, if a person dies leaving no testament (will) i.e. dies intestate, the rules of intestate Succession are applied for distribution of the property among heirs.

Will – Meaning and Definition: Will is the Anglo-Mohammedan term for its Arabic equivalent 'wasiyat'. A document embodying the will is called 'wasiyatnaama'. A 'Will or Testament' is a document or an instrument, which declares or contains the intention of the owner of the property as to how his property is to be disposed of (distributed) after his/her death. The will takes effect on the death of the person making it. It can be revoked by the maker, before his death.

A will has been defined as 'an instrument by which a person makes disposition of his property to take effect after his death, and which is in its own nature, ambulatory and revocable during his life.' Tyabji defines will as 'Coferment of right of property in a specific thing or in a profit or advantage or in a gratuity to take effect on the death of the Testator.' According to Section 2(h) of Indian Succession Act, 1925 'Will is the legal declaration of the intentioin of a testator with respect to his property which he desires to be carried into effect after his death.'

Testator: The person, who makes/creates a will is called 'Testator'.

Legate: The person/persons, in whose favour, the will is created is called 'Legatee'.

Legacy: The subject matter of the will is called 'Legacy'. It is the property to be distributed among the heirs.

Executor: The testator, while executing the will, may appoint a person to execute the will in accordance with its contents (after his death). He is called 'Executor'.

In the absence of the appointment of Executor by the testator, the Court may appoint a person called 'Administrator' to execute the will.

Codicil: Codicil is an instrument made in relation to will. It is a part of the will.

Abatement of Legacies: When a testator bequeaths more than one third of the property, and the heirs refuse to give consent, it is to be adjusted accordingly.

Lapse of Legacy: If the Legatee does not survive, the bequest (Property under will) is distributed as if there is no will.

Essentials/Requisites of will: A will to be valid, the following conditions are to be satisfied.

1. Capacity/Competence of Testator;
2. Competence of Legatee;
3. Subject Matter;
4. Testamentary Capacity.

1. Capacity of Testator: According to Muslim Law, any person, who is a major and is of sound mind can make a will. However, a minor can make a will subject to ratification on attaining majority. According to Muslim Law, the age of Majority is 15 years., but it is not applicable to the wills in India.

In *Abdul Manan Khan v. Murtaza Khan* (AIR 1991 Pt. 155), Patna High Court held that any Mohammedan having a sound mind and not a minor, may make a valid will to dispose of the property. So far as a deed of will is concerned, no formality or a particular form is required in law for the purpose of creating a valid will. An unequivocal expression by the testator serves the purpose.

Will of a person committing suicide: Under Sunni Law, the will of a person committing suicide is valid. Under Shia Law, a will made by a person who has done any act towards the commission of suicide is not valid, but if the will is made before the doing of any act towards the commission of suicide, it is valid. In a case where the deceased first made his will and afterwards took poison, it was held that the will was valid (*Mazhar Husen v. Badha Bibi,* 21 All. 91).

2. Competence of Legatee: Any person having capacity to hold the property can be a legatee. The Legatee may be a Muslim or a Non-Muslim, man or woman, a major or a minor or even a child in the womb provided the child is born within 6 months of the death of the testator.

a) Bequest to an institution – A bequest may be validly made for the benefit of an institution.

b) Bequest to a non-Muslim – A bequest in favour of a non-Muslim is valid. In Hedaya the following verses of the Quran have been quoted:

'Ye are not prohibited, O believers, from acts of benevolence towards those who subject themselves to you, and refrain from battles and contentions.'

It is, therefore, clear that a Muslim can give his property by bequesting the same in favour of a non-Muslim provided the non-Muslim is not hostile towards Islam.

c) Bequest to testator's murderer – According to Sunni Law, a bequest to a person who caused the death of the testator whether intentionally or unintentionally is invalid. Under Hanafi Law, a will in respect of a person who has caused the death of the testator can be validated if the heirs have given their consent.

According to Shia Law, it is invalid if it is caused intentionally and not if accidentally or unintentionally.

d) Bequest to an unborn person – A child who is born within six months of the date of making the will is treated as a legatee in

existence and hence competent to take the bequest. But in Shia Law, a bequest to a child in the womb is valid, if it is born in the longest period of gestation, i.e. ten lunar months.

e) Bequest for a charitable object – A bequest for the benefit of a religious or charitable object is valid. The only requisite is a general intention to charity, e.g. where a bequest is made in the way of God, it is valid and the legacy must be spent on good and pious objects. Under Muslim Law, certain restrictions have been imposed on the right of the legators to make a will depriving the right of the heirs. The Calcutta High Court has said that the restriction against will to heirs cannot be got over either under colour of a religious bequest or by having recourse to a partition deed between the legator and his heirs.

3. Subject Matter: A Muslim can bequeath any property movable or immovable, corporeal or incorporeal, if the following conditions are satisfied:

i) The property must be capable of being transferred.

ii) The property must be in existence at the time of testator's death. It is not necessary that it should be in existence at the time of the making of the will.

iii) The testator must be the owner of the property to be disposed by will.

4. Testamentary Capacity: A Muslim cannot dispose of by will more than 1/3 of the net assets after allowing (meeting) for the debts and funeral expenses of the testator (under both Hanafi Law and Shia Law). The remaining 2/3 share should be made available for distribution amongst the heirs. Even for bequeathing the 1/3rd share, the Muslim has to obtain the consent of the other heirs. Relevant Case on this point is: GULAM MD.vs. GULAM HUSSAIN, AIR 1932 PC 81... Held in this case that, bequest in favour of heirs without the consent of other heirs is invalid.

An heirless Muslim can bequeath his entire property. In case, his wife, is the only heir, he can bequeath all his properties minus the share of his wife (as per Koranic table).

Bequeathable One-third: It means a third of the estate of the testator as is left after the payment of the funeral expenses, other charges and debts of the deceased (testator). All schools of Muslim Law except the Ithana Ashari School lay down that bequest of more than one third unless consented to by the heirs is invalid or a custom or usage so permits.

In *Abdul Manan Khan v. Murtaza Khan* (AIR 1991 Pat 155), the Court held that a bequest in favour of an heir is invalid unless the other heirs consent to it after the testator's death. A provision has been made in law to obtain consent of the heirs after the death of the testator, if any reason of a Will more than 1/3 of the properties is sought to be bequeathed to an outsider, and to any extent to a heir. Such consent can be inferred from conduct. Acts of attestation of Will by legatees and taking of possession by them of property bequeathed could signify such consent.

Exception to one-third Rule: The exceptions to the one-third rule are:

i) When the testator does not have any heir – If restrictions of permissible one-third is applied to him, the remaining two-third goes to the Government by the doctrine of escheat, while the primary purpose of applying the bequeathable permissibility to the extent of one-third is to protect the rights of the heirs and not that of the Government. An heirless person, can make a bequest of his total property.

ii) Where the heirs themselves consent to the bequest in excess of one-third – As the chief objective of the restriction is to safeguard the interests of the heirs, if these heirs whose shares are likely to be adversely affected by the excess bequest themselves give them consent (that should be voluntarily given), the excess bequest will be validated.

Formalities of Wills: Muslim law requires no specific formalities for creation of a will. It may be made in writing or oral or even by gestures. Though it is in writing, it need not be signed by the testator and attested by the witnesses (*Ramjilal vs. Ahmed*,

AIR 1952 MP 56). It is necessary that the intention of the testator should be clear and unequivocal.

Thus, a Muslim will may be oral or written or by gestures as detailed below:

Oral Wills: Under Muslim Law an oral Will is perfectly valid but at the same time one who rests his title on oral Will is bound to allege and prove with utmost precision the words (of Will) on which he relies with every circumstance of time and place.

By the Muslim law no writing is necessary to make a Will valid and no particular form, even verbal declaration is necessary as long as the intention of the testator is sufficiently ascertained.

A person relying on oral Will must produce evidence to prove that testator really wanted to make it. Strict proof will be required. If the intention is clearly expressed a Will takes effect as a Will.

Will in Writing: A writing by a Mohammedan by way of testamentary disposition is valid and binding on the persons claiming through his estate. A Mohammedan Will, though in writing, does not require to be signed; not, even if signed, does it require attestation because a Mohammedan Will does not require to be in writing at all.

A letter writing by the testator shortly before his death, and containing directions concerning the disposition of his property, was considered to constitute a valid Will.

Even a document written by a person containing instructions before the death, to his legal advisor or to his relations, who were instructed to hand it over to legal advisor, would operate as a valid Will and may be admitted to probate. But in any case intention must be clear to constitute such documents as Will.

Seestani states, 'If a written paper is found, signed and sealed by a deceased person, and if it is known or conveyed that he wrote it as a Will, it should be acted upon. But if it is known that it was not his intention to make a Will, and that has simply made some notes for a Will to be written later, it will not be considered as Will.'

Will by Gesture: Even a gesture, if the intention is sufficiently manifest, is enough. The Fatawa-e-Alamgiri says, 'A sick man makes a bequest and being unable to speak from weakness gives a nod with his head and it is known that he comprehends what it is about if his meaning be understood and he dies without regaining the power of speech, the bequest is lawful.

If the testator is dumb, he may make a Will by gestures provided that the signs are made in such a manner as is commonly used to denote affirmation. In a case of a person whose inability arises subsequently owing to some illness etc. a Will made by sign will be valid only if the testator was deprived of speech for a long time so as to make the signs habitual to him but not if the inability is recent.

It makes no difference between the case of a dumb person and of one whose inability is supervenient.

Construction of Will: A Muslim will is to be construed in accordance with the rules of construction of the will as laid down in Muslim Law. Will is a document created by any person during his life time, which operates after his death. The contents of the will are to be implemented to fulfill the intention or desire of the testator after his death. Sometimes, the contents may not be clear. In such a case, it may be interpreted as per the option of the heirs.

For instance, if the testator, in his will, bequeaths one house to heir 'A' and the other for heir 'B' without any specification. Then, the heirs have to make necessary arrangement.

Limitations of testamentary power of a Mohammedan: When the owner of property dies intestate his property devolves not on the heirs according to the scheme of inheritance, but on the legatees who take, bequests under the Will. The limitation as regards the testamentary disposition of a Muslim are as follows:

i) There is a limit or restriction as to the extent of property.

ii) There is a limit or restriction as to the person to whom the bequest may be made.

Limits as regards to the property: Extent of the property that may be bequeathed (Bequeathable third)

The limit of testamentary power is that a Mohammedan (both Sunni and Shiite) cannot by Will dispose of more than a third of the surplus of his estate after payment of funeral expenses and debts. Bequests in excess of legal third cannot take effect, unless the heirs consent thereto after the death of the testator. Two-thirds of the estate should, thus, be available for distribution among the heirs.

Therefore a Muslim can make a valid bequest, in favour of a non-heir or a stranger only to the extent of 1/3 of the net assets remaining after payment of funeral expenses and debts.

A Sunni Muslim can make a valid bequest in favour of a non-heir or stranger only to the extent of one-third of the net assets remaining after payment of his funeral expenses and debts, without the consent of the heirs. A bequest to an heir is, however, invalid without the consent of the remaining heirs after the death of the testator. A bequest by a Sunni Muslim or more than one-third of his estate to a stranger may be valid if the heirs whose rights are infringed thereby consent after the death of the testator. The fact an heir consenting to a bequest to a co-heir is an insolvent at the time when the consent is given, is immaterial; the consent is effective all the same.

According to Shia law, a Muslim may leave a legacy to an heir or non-heir so long as it does not exceed one-third of his estate. It is, however, not necessary that, where the legacy is for a larger share, the consent of heirs should be express; it may be implied from the conduct showing the intention.

According to the Shia Law, if the legacy exceeds one-third, it is not valid unless the other heirs consent thereto. Such consent may be given either before or after the death of the testator. But consent cannot be given after previous repudiation.

If the bequest exceeds one-third and the heirs refuse to confirm the bequest, then in Shia law there is no ratable abatement as under

the Sunni Law. The legatees first named take up to a limit of the one-third and the rest take nothing.

As to the consent to a legacy exceeding the legal one-third, it is to be remembered that the consent once given cannot be rescinded. The consent need not be express, it may be signified by conduct showing a fixed and unequivocal intention.

Limitations as to persons to whom the property may be bequeathed:

1. Bequest in favour of an heir – The general rule in this regard is that the bequest in favour of an heir is invalid unless the other heirs' consent to it after the death of the testator.

This general rule seems to be justified on the ground that:

a) It prevents a testator from interfering with or defeating the rules of inheritance.

b) A bequest in favour of an heir to the exclusion of other heirs would be an injury to the latter and it would reduce their shares.

c) It would consequently induce a breach of the ties of kindred.

Such a consent should be given after the death of the testator. Before the death of the testator, under Sunni Law, the person gets no interest in the property. Under Shia Law the consent may be before the testator's death.

2. Bequest in favour of an heir and stranger – When the bequest is made to an heir and also to a stranger, the bequest to the heir is invalid unless assented by other heirs, but the bequest to the stranger is valid to the extent of 1/3 of the property.

3. Bequest to an unborn person – A bequest to an unborn person is void according to Sunni Law. It is valid if it is made to a child in the womb provided it is born within six months of the date of the Will.

Unborn Shia Law, a bequest to a child in womb is valid if it is born in the longest period of gestation i.e. ten months.

4. Bequest to a testator's murderer – A bequest to a person who causes the death of the testator whether intentionally or accidentally, is void under Sunni Law. Under Shia Law, such bequest is void only when the murder was intentionally done. If it was done accidentally by him, it will not be void.

A bequest in favour of an heir is invalid unless the other heirs consent to it after the testator's death. A provision has been made in law to obtain consent of the heirs after the death of the testator; if any portion of Will more than 1/3 of the properties is sought to be bequeathed to an outsider, and to any extent to a heir. Such consent can be inferred from the conduct or alienation of Will by legatees and taking of possession by them of property bequeathed would signify such consent.

Revocation of Will: A Muslim Will or any part thereof may be revoked by the testator at any time before his death. The revocation may be express (oral or in writing) or implied. A Will may be expressly revoked by tearing it off or by burning it. Any act, which results in the extinction of the subject matter or proprietary rights of the testator will impliedly revoke the will. For instance, if the testator transfers the same property by sale or gift subsequently to another, it amounts to implied revocation.

DEATH - BED - GIFT : (MARZ-UL-MAUT)

When a person creates/makes a gift out of an apprehension (fear) of imminent death and dies later, it is called "Death-Bed-Gift". In other words, if a person makes a gift during illness and dies later, it is called Death-Bed-Gift or Marz-Ul-Maut. It is subject to two restrictions: (i) disqualification of heir; and (ii) property disposed of should not exceed 1/3 of the net assets. These restrictions may be relaxed with the consent of the heirs.

The Death-Bed-Gift is valid only when the donor dies of illness during which the gift was made.

Essentials of Death-Bed-Gift (Marz-Ul-Maut):

1. There must be an apprehension as to immediate death.

2. To effect the transfer of property, by way of gift in anticipation of death.

3. Mere apprehension of death as to old age is not sufficient.

Section 129 of T.P. Act deals with Death-Bed-Gift or *Donatio Mortis Causa*. Similarly, Section 191 of the Indian Succession Act, 1925 deals with Death-Bed-Gift with regard to movable property.

With regard to the restrictions of making a death-bed-gift by a Muslim, the rules with regard to disposition to the extent of 1/3 of net assets (after meeting debts and funeral expenses of testator) and also to obtain the consent of other heirs, are applicable in the case of Marz-Ul-Maut also.

Distinction between will and gift: Both will and gift are modes of transferring property from the person making the gift or will to the person in whose favour it is made. The main point of distinction between the two is that while 'gift' is a transfer of property made immediately 'will' is a 'transfer of property to take effect after the death of the testator'. This warrants another difference between the two, one is a transfer inter vivos, the other is testamentary. Gift being an immediate transfer, delivery of possession is essential for it. A disposition by will takes effect after the death of the testator and hence no such delivery of possession is required in it. Furthermore, the subject matter of gift must be in existence at the time of making the gift. This is not a requisite to the validity of a bequest (a disposition by will), it is sufficient if the subject exists at the time of testator's death. The right of donor, to gift his property, as a general rule is unrestricted (except gift during death-illness) while the right of a person making a bequest is limited in two ways. Thus the following points of distinction between the two should be noted:

i) Gift is an immediate transfer of right or interest, will is a transfer of right to take effect after the death of the testator.

ii) In a gift transaction, delivery of possession is necessary but in a will it is not required.

iii) The subject of gift must be in existence at the time of gift; it need not exist at the time of making the will. It is sufficient if the subject is in existence at the death of the testator.

iv) Right of donor to a gift is unrestricted. The right of making a bequest is limited in two ways.

v) After completion a gift cannot be revoked unless by a formal decree of a Court; a will may be revoked at any time after making of it.

vi) Doctrine of Mushaa has no application in case of disposition made by will.

Difference between Shia and Sunni Law:

Sunni Law	Shia Law
1. Bequest of any portion to an heir without the consent of other heirs is invalid.	1. A bequest to the extent of 1/3rd can be made to an heir without the consent of other heirs.
2. A bequest to a child in womb is valid if born without 6 months.	2. It is valid even if born in the longest period of gestation, i.e. 10 months.
3. A legatee who causes death even by accident is disentitled.	3. Only intentional murder disentitles a legatee.
4. Heir's consent should be given after the death of testator.	4. Heir's consent may be given before or after the death.
5. Recognition of rateable distribution.	5. Reteable distribution is not recognized under Shia Law.
6. A will of a person committing suicide is valid.	6. It is valid only when the will is made before taking any step towards the act of suicide.
7. If the legatee does not survive the testator, the legacy lapses and reverts to the testator.	7. The legacy does not lapse but passes to the heirs of the legatee. It reverts to the testator when the legatee dies without leaving any heir.
8. Acceptance of the legacy before the testator's death is of no effect.	8. Acceptance of the legacy during the testator's life time is lawful.

Lecture - VI
Non - Muslim Will (Testamentary Succession of Hindus, Christians and others)

Chapters IV-XIV of the Indian Succession Act, 1925 deal with testamentary succession in respect of Non-Muslims i.e. Hindus, Christians and others.

Introduction: When a person dies his/her property devolves upon his/her heirs. A person may die with or without a will (Testament). If a person dies leaving a will i.e. dies *intestate*, the property is distributed among his/her heirs according to the rules of Testamentary Succession. In other words, the property is distributed as per the contents of the testament or will. On the other hand, if a person dies leaving no testament (will) i.e. dies intestate, the rules of Intestate Succession are applied for distribution of the property among heirs.

Will - Meaning: A 'Will or Testament' is a document or an instrument, which declares or contains the intention of the owner of the property as to how his property is to be disposed of (distributed) after his/her death. The will takes effect on the death of the person making it. It can be revoked by the maker, before his death.

A will is the legal declaration of the intention of a testator with respect to his property, which he desires to be carried into effect after his death. Katyayana Says – 'what a man has promised, in death or in sickness for religious purpose, must be given, and if he dies without giving it, his son shall doubtlessly be compelled to deliver it.' And again, 'after delivering what is due as a friendly gift (promised by the father), let the remainder be divided among the heirs.' Harita also says – 'A promise legally made in words, but not performed indeed, is a debt of conscience both in this world and the next.'

Testator: The person, who makes/creates a will is called "Testator".

Legatee: The person/persons, in whose favour, the will is created is called 'Lagatee'.

Legacy: The subject matter of the will is called 'Legacy'. It is the property to be distributed among the heirs.

Executor: The testator, while executing the will, may appoint person to execute the will in accordance with its contents (after his death). He is called 'Executor'.

In the absence of the appointment of Executor by the testator, the Court may appoint a person called 'Administrator' to execute the will.

Codicil: Codicil is an instrument made in relation to will. It is a part of the will. A codicil means instrument made in relation to a will and explaining, altering or adding to its dispositions and shall be deemed to form part of the will.

According to Sec.2(b) of the Indian Succession Act, 1925, 'Codicil' means "an instrument made in relation to a will, and explaining, altering or adding to its dispositions, and shall be deemed to form part of the will".

Abatement of Legacies: When a testator bequeaths more than one third of the property, and the heirs refuse to give consent, it is to be adjusted accordingly.

Lapse of Legacy: If the Legatee does not survive, the bequest (Property under will) is distributed as if there is no will.

Definition: "A will or Wasiyyat" is defined as `an instrument by which a person makes a disposition of his property to take effect after the death and which is in its own nature ambulatory and revocable during his life'.

1. ESSENTIALS OF WILL

To constitute will, the following conditions are to be satisfied.

1. The person making a will (Testator) must have property of his own.
2. He must have an intention to give such property through will (Free Consent).
3. There must be witnesses.

What property may be disposed of by will – Under the pure Hindu Law, a Hindu could not by will bequeath property which he could not have alienated by gift inter vivos nor can he by will so dispose of his property as to defeat the legal right of his wife or any other person to maintenance.

A Hindu could dispose of by will, the following property:

1. According to Mitakshara: A Hindu could dispose of by will the following property:

i) Separate or self-acquired property.

ii) A sole surviving coparcener may dispose of his property by will.

iii) Sandayika Stridhan.

iv) All stridhan during widowhood, and

v) Impartible property, unless prohibited by custom or the terms of the grant.

But no coparcener, not even a father could dispose of by will his undivided coparcenary interest, even if other comparceners consent to the disposition. Before passing of the Hindu Succession Act of 1956 a coparcener could not execute a deed of will out of his coparcenary share in the coparcenary property. It was not regarded valid. Even if the members of coparcenary extended their consent to it it would be taken as family settlement but it would not be treated as a valid will.

2. According to Dayabhaga: The same as under Mitakshara law, with the following additions.

i) A coparcener could dispose of his share in the coparcenary by will.

ii) A father could dispose of all his property ancestral or self-acquired.

2. KINDS OF WILL

According to the Indian Succession Act, 1925, the Non-Muslim Wills are of two kinds as stated below:

1. Privileged Will; and
2. Unprivileged Will.

1. Privileged Will: Sections 65 and 66 of Chapter IV of the Indian Succession Act deal with Privileged Will. A 'Will' is said to be privileged, if it is made by a person employed in Army or Navy or Air-Force namely.,

a) a soldier engaged in war; or

b) a mariner (Navy); or

c) an Airman employed in warfare or expedition.

2. Unprivileged Will: Sections 63 and 64 of Chapter III of the Indian Succession Act deal with unprivileged will. If a will is made by a person other than the persons stated above, it is called 'Unprivileged Will'.

The provisions of the Indian Succession Act are applicable to an unprivileged will. However a privileged will is not governed by the Act.

Conditions for making privileged will:

1. It may be oral or in writing. It should be made by the Testator before two witnesses. It becomes void after one month, if the Testator is alive.
2. If it is hand written, it need not be signed or attested.
3. If it is written by somebody and signed by the testator, it need not be attested.
4. Verbal instructions in the presence of two witnesses makes the will valid.

Mode of Executing Will or Unprivileged Will (Section 63): Section 63 of the Indian Succession Act, 1925 provides for the mode of executing the will. The testator must sign or affix his mark on the will. The mark must be affixed by Testator himself. Otherwise, it is not valid.

Radhakrishna vs. Subraya, 40 Mad, 550 — In this case, the testator touched the pen and gave it to another, who affixed the mark. Held that the will is not valid.

Capacity of Parties: A will to be valid, the parties have to fulfil certain conditions as to their competence as stated below:

1. Capacity of Testator: Any person, who is a major and is of sound mind can make a will. However, a minor can make a will subject to ratification on attaining majority. According to Muslim Law, the age of Majority is 15 years, but it is not applicable to the wills in India.

2. Competence of Lagatee: Any person having capacity to hold the property can be a legatee. The legatee may be a man or woman, major or minor or even a child in the womb, non-Muslim (i.e. Hindu, Christian etc.) or Muslim.

Revocation of Will (Section 70): Under the Act, a will may be revoked in the following cases:

1. Subsequent Marriage of the Testator (Section 69);
2. Subsequent will or Codicil;
3. By an Instrument; and
4. Destruction of the will

1. Subsequent Marriage of Testator (Sec.69): The will made before marriage stands revoked by the subsequent marriage of the Testator.

2. Subsequent will or Codicil: Codicil is a part of the Will. If the contents of the subsequent will or codicil are inconsistent with the 'Previous Will', the will stands revoked.

3. Revocation by Instrument: The Testator can revoke the will by expressing his intention to revoke by a declaration in writing.

Will when void: A will or any part of a will, the making of which has been caused by fraud or coercion or by such importunacy as taken away the free agency of the testator, is void. To constitute undue influence there must be coercion. The onus rests on the person

who propounds a will to satisfy the conscience of the court that it is a will of a free and capable testator.

3. PROBATE AND LETTERS OF ADMINISTRATION

To obtain a decree for the recovery of debt due to the estate of deceased Hindu, it is necessary to produce a Probate or Letters of Administration or Succession Certificate. Where a Hindu dies intestate, it is not necessary in every case to obtain Letters of Administration. In the case of Hindu wills of the classes specified in clauses (a) and (b) of Section 57 of the Indian Succession Act, the right as executor or legatee can be established in a Court of Justice, unless a court of competent jurisdiction shall have granted probate of the will.

Sections 217 to 236 of the Indian Succession Act, 1925 deal with Probate and Letters of Administration. Probate is a copy of will certified by a competent court. Section 2(f) of the Indian Succession Act, 1925 defines 'Probate' as a copy of the will certified under the seal of a court of a competent jurisdiction with a grant of administration to the estate of the testator. It can be granted to the executor appointed expressly or impliedly by the will (S.222)

Letters of administration are granted by a court having probate jurisdiction to show that the authority incident to the office and duty of an administration has been devolved upon the person therein named. If the executor, appointed through the will, renounces to accept the executorship within the prescribed time, then, the will may be proved and letters of administration with a copy of the will may be granted to a person for administration of such intestacy.

4. SUCCESSION CERTIFICATE

Chapter X containing Sections 370 to 390 of the Indian Succession Act, 1925 deal with 'Succession Certificate'. It is issued by a court of competent jurisdiction with respect to a debt or security. The main object of the Succession Certificate is to facilitate the collection of debts on succession. It avoids disputes among the heirs/ relations to collect the debts of the deceased. Further, the interest of the debtor is protected if he makes payment to the holder of the

succession certificate. The debtor is protected even against misrepresentation by the holder. It is a conclusive proof that the payment made against succession certificate is valid.

Contents: Succession Certificate contains the following particulars.

1. Debts and Securities as specified by the Court of competent jurisdiction.
2. Person, to whom the certificate is granted to; and
3. The power empowered.
   a) to receive interest or dividends on; or
   b) to negotiate or transfer; or
   c) both to receive interest or dividends on, and to negotiate or transfer, the securities or any of them.

Conditions: Succession certificate can be granted by a court of competent jurisdiction under the following circumstances.

1. When the probate or letters of administration is not compulsory (Ss.212 and 213).
2. Where the joint family property devolves/passes by survivorship.
3. If the deceased is a Muslim or an Indian Christian.
4. If the will and probate left by the deceased Hindu are not compulsory according to Sec.57.

Succession Certificate is necessary in the above cases, when a suit is filed for recovery of the debt of the deceased. Otherwise, the court will not grant a decree against the debtor (S.214).

Extension Certificate: Sec.376 of the Act empowers the court of competent jurisdiction to extend the same Succession Certificate to another debt or security depending upon the circumstances.

Amendment: According to Sec.377 and 378 of the Act, the Court may amend the Succession Certificate, when it thinks fit.

Court Fees: Succession Certificate is granted against the payment of a court fees as prescribed by the Court Fees Act, 1870.

Revocation of Succession Certificate (S.383): Succession Certificate may be revoked under the following circumstances:

1. When the proceeding to obtain the certificate is found defective in substance;
2. Where the succession certificate is obtained by fraud or misrepresentation or by concealment of a material fact;
3. Where, it is obtained by untrue/false allegation of fact;
4. If it is found useless or inoperative;
5. When the decree or order passed by the court in a suit or other proceeding with respect to effects comprising debts or securities specified in the certificate renders it proper that the certificate is revoked.

5. DOCTRINE OF CY PRES (Short Notes)

The expression 'Cy Pres' literally means "as nearly as possible". The doctrine of cy pres is applicable, when a bequest is made upon a condition precedent. Where a testator has expressed a general intention and also a particular way in which he wishes to be carried out, but the intention cannot be carried out in that particular way under certain provisions of the law then, the court will direct the intention to be carried out, as early as possible in the way desired. *Eg:*— A bequest is given to 'P' on the condition that he shall marry with the consent of X, Y and Z. X died later. If P marries with the consent of Y and Z, the condition is nothing but substantially complied with.

QUESTIONS AND HOW TO ANSWER

Q) Explain the doctrine of Cy pres. (A.U. August 2001, Part-A, Q.7, Marks: 4)

Ans. Write in brief about the doctrine of Cy Pres.

Q) Discuss the law relating to privileged wills? Who can make privileged wills (N.U., April, 1999, Part-B, Q.12, Marks:18)

Ans. Write the meaning and definition of will, terms, kinds of Non-Muslim will and then privileged will in detail.

Q) Explain salient features of the Muslim Law relating to wills. Can a will be executed in favour of a legal heir? (N.U. April 1999, Part-B, Q.13, Marks:18)

Ans. Write the meaning, definition and terms of will and then about Muslim Will (Wasiyyat) in detail.

Q) What is succession certificate? Who can apply for it and when it can be granted? (A.U., August 2001, Part-B, Q.1)

Ans. Write about the Succession Certificate in detail.

Lecture-VII
WAQF

Origin: The institution of Waqf was not found in Quran. Prior to Islam, there was no Waqf in Arabia. Therefore, the institution of Waqf has been developed with Islam. The origin of the institution of Waqf cannot be traced to any single source. It is the result of combination of several factors and various elements which were intimately fused during the formative period of Mohammedan Law.

The earliest written record of Waqf comes from the city of Ramalah in Palestine. It consists of a table setting out the basic terms of an endowment founded in A.D. 912, a man named Faiq-al-Hadim ibn Abd-Allah-al-Siqilli. The property was a Caravan Sarai, a rest house for the merchants and travelers.

Waqf under the Muslim Law owes its origin to a rule laid down by the Prophet of Islam; and means 'the tying up of property in the ownership of God the Almighty and the devotion of the profits for the benefit of human beings. As the result of the creation of a Waqf, the right of Waqif (settler) in the property is extinguished and the ownership is transferred to the Almighty.

Meaning: The term 'Waqf' literally means "detention, stoppage or tying up or dedication". It is a dedication in perpetuity of some specific property movable or immovable by a person professing Islam, for a pious purpose or succession of pious purposes. In India, Waqf is a pious endowment, which is inalienable. But in Islamic law it means:

1. State lands, which are inalienable, used for charitable purposes; and
2. Pious endowments.

The person, who creates the waqf is called 'Waqif or Settler'. The person in whose favour, the property is transferred (for the pious/ religious/charitable purpose) is called 'Mutavalli'. A mutavalli is the Manager or the administrator (or the Governor, Superintendent or Curator) appointed for managing the waqf. When once, a waqf is validly created, all rights over the property will pass on to the God.

The law of Waqf, writes Ameer Ali, is 'the most important branch of Muslim Law, for it is interwoven with the entire religious life and social economy of Muslims. Waqf in its literal sense means detention or stoppage. Khwaja Mohammad Noor observes – 'The legal meaning of Waqf according to the accepted doctrine of the Hanafi school is the extinction of the proprietor's ownership in the thing dedicated and its detention in the implied ownership of God in such a manner that the profits may revert to and be applied for the benefit of the mankind.'

Definition: According to Abu Hanifia, 'it is the detention of a specific thing in the ownership of the waqif or appropriator, and the devoting its profits or usufruct to charity, the poor, or other good objects, in the manner of areeat or commodate loan' The two elements to be noted are that the right of the owner continues and that the usufruct is to be devoted to some charitable or pious purpose.

According to Abu Yusuf (Disciple of Abu Hanifa), 'Waqf is the detention of a thing in the implied ownershipof almighty God in such a manner that its profits may revert to or be applied to the benefit of His creatures.' There are three elements in this definition:

i) Ownership of God.

ii) The extinction of the founder's right, and

iii) The benefit to mankind.

Imam Mohammad does not agree to this view. He thinks that the right of the Waqf does not cease in the property until he has appointed a Mutawalli and delivered its possession into his hands.

Abu Hanifa, a veteran Muslim Jurist defines: "It is the detention of a specific thing on the ownership of a waqf or appropriator and the devoting its profits or usufruct to charity, the poor, or other good objects, in the manner of area at or commodate loan."

Section 2 of the Musalman Waqf Validating Act, 1913 defines Waqf as "the permanent dedication by a person possessing the Musalman faith of any property for any purpose recognised by Musalman law as religious, pious or charitable."

This definition is not exhaustive.

Section 3(1) of the Waqf Act, 1954 defines: "Waqf means the permanent dedication by a person professing Islam or any other person of any movable or immovable property for any purpose recognised by the Muslim law as pious, religious or charitable and includes:

i) a waqf by user but such waqf shall not cease to be a waqf by reason only of the user having ceased irrespective of the period of such ceasor;

ii) grants including mushrut-ul-khidmat, muafies, khairati, quazi services, madadmas for any purpose recognised by the Muslim Law as pious, religious or charitable; and

iii) a 'waqf-alal-aulad' and waqif means any person making such dedication;

Provided that in the case of a dedication by a person not professing Islam, the waqf shall be void if, on the death of such person, any objection to such dedication is raised by one or more of his legal representatives.

Essentials of Waqf: Following are the essential elements/ Characteristics/conditions of the Muslim institution of waqf:

1. The property dedicated for waqf vests in God.
2. Waqf must be permanent.
3. Waqf must be irrevocable.
4. Waqf properties are inalienable.

1. Property vests in God: The very essential feature of waqf is that the property dedicated for waqf vests in God. When once it is dedicated, the ownership will pass on to God. Figuratively speaking, "property is God's acre" (as quoted in *Abdul Rahim vs. Narayan Arora* 1932 PC 44). Under the Shia Law also the property of waqf vests in God.

In *Dwarka Dass v. Punjab Wakf Board* (AIR 1991 P&H 89), a piece of land was reserved for use as a graveyard by Muslims of a village. Land was given to them as licensees. The proprietary

rights in the same was retained by proprietors. The P & H. High Court held that essential ingredients for establishing public graveyard were non-existent. The Cort further said that Waqf be created by dedication.

The Madras High Court in *N.R.Abdul Azeez v. E.Sundaresa Chettiar* (AIR 1993 Mad 169), held that it is a fundamental principle of the Muslim law of Waqf that when a mosque is built and consecrated by public worship, it ceases to be the property of the builder and vests in God. A mosque once so consecrated cannot in any case revert to the founder and every Muslim has the legal right to enter it and perform Namaz. Further, no Muslim can be denied the right to offer prayers therein on the ground that the mosque fall into disuse long back. Therefore, when the dilapidated structure was proved to be old mosque, it became a Waqf by user and though there was no evidence of an express dedication of the structure by the owner for the purpose of mosque and no evidence that any member of Muslim community said prayers there, the subsequent owner cannot prevent any other Muslim from coming over to the structure and offer prayers. It becomes Waqf by user.

But in *Mohd. Ismail Faruqui v Union of India (Ayodhya Case)* (AIR 1994 SC 605), the Supreme Court has observed that where a mosque has been adversely possessed by non-Muslims, it lost its sacred character as mosque. Hence the view that once a consecrated mosque, it remains always a place of worship as a mosque was not the Mohamedan Law of India as approved by the Indian courts. It was further held that a mosque in India was an immovable property and the right of worship at a particular place is lost when the right to property on which it stands is lost by adverse possession.

2. Waqf must be permanent: Waqf must be created for an unlimited period. Waqfs created for a limited period are not recognised by Muslim Law.

In *Mohd. Khasim v. Mohd. Dastagir* [(2006) 13 SCC 497], the Supreme Court in unequivocal terms held that according to Mohammedan Jurists, the term 'Wakf' literally means dedication by

a person professing the Mussalman faith of any property for any purpose recognized by Mussalman law as religious, pious or charitable.

The Court further observed that in order to constitute a Wakf, there must be a permanent dedication of the properties in question in favour of God Almighty and while the objects of the Wakf may initially be for the benefit of the Waqf's family and other descendants, the ultimate beneficiary has to be God. The other important lays test in the nature of inalienability of the properties forming the nucleus of the Waqf. Once a Waqf is created the title of the Waqf in the dedicated property is extinguished and vests in God. The Wakif is entitled to reserve power to alienate any portion of the properties, but for the benefit of the Waqf.

3. Waqf must be Irrevocable: Once constituted/created validly, a waqf can not be revoked. In other words, the waqf cannot take it back. If the waqf-nama contains a condition that the waqf has a right to revoke upon the happening of any event, such waqf is void. However, a testamentary waqf may be revoked by the testator, at any time before his (testator's) death.

In *Abdul Sattar v. Advocate General of Bombay* [(1932) 35 Bom. LR 18], two settlers, Ahmed and Sudaiman purported to create a Waqf by a deed which contained a clause enabling one of them by deed wholly to alter the trusts declared by the deed and by the same deed or by will or codicil to declare new trusts concerning the trust premises. It was held that the power of revocation reserved in favour of the settlers rendered the whole deed void for it is impossible to contemplate property transferred to Almighty God subject to a condition enforceable in the temporal courts for recovering that property for the benefit of the settler.

4. Waqf properties are inalienable: As a Waqf is a permanent endowment, perpetuity is ensured by the doctrine that Waqf property belongs to God. Once the property is dedicated to God, it cannot be alienated. However, the mutawalli, with prior permission of the court may alienate the waqf properties. The waqf-nama may allow the mutawalli to sell or grant a lease of waqf properties in certain circumstances.

Who can make a Waqf? Capacity to make a Waqf: Any Muslim, who is a major (i.e. 18 years of age) and is of sound mind can make a waqf. A guardian on behalf of the minor cannot make a waqf.

There had been a controversy as to the question, whether a non-muslim can make a waqf? The Nagpur High Court in *Moti Shah vs. Abdul Gaffa,* AIR 1953 Nag. 38 answered the question that a non-Muslim can make a waqf stating that — the law only requires that "the object for which the dedication is made should be lawful according to the creed of the dedicator as well as the Islamic doctrines. Ameer Ali also observed that according to the classical jurists of Islam, a non-Muslim could make a waqf. But the Musalman Waqf Validating Act, 1913 and the Waqf Act, 1954 contemplate that, a waqf can be made only by a Muslim. In view of the clear provisions in the statute and also the fact that waqfs essentially form part of personal law of the Muslims, waqfs can be made only by a Muslim.

Subject-matter of Waqf: According to Abu Hanifa, the subject matter of waqf should be of a permanent nature i.e. immovable property viz. land, buildings. But, gradually all kinds of properties, both movable and immovable, tangible and intangible are made the subject matter of the waqf.

Objects of waqf: The object of the Waqf should be indicated with reasonable certainity in the Waqf-nama and the object of the Waqf must not be opposed to tenets of Islam and should be for benefit of mankind. According to Sec.2(1) of the Musalman Waqf Validating Act, 1913 and Sec.3(1) of the Waqf Act, 1954, the object/purpose of creating waqf must be one recognised by Muslim law as *"religious, pious or charitable"*.

Waqf how created: Muslim Law does not prescribe any form for creating Waqf. It may be either verbal or in writing.

Modes of creatioin: Waqf may be created either–

1. by an act inter vivos; or
2. by will; or

3. during death illness (marz-ul-maut); or

4. by immemorial user.

Kinds of waqf: Under Muslim Law, there are two kinds of waqfs, namely:

1. Public Waqfs; and

2. Private Waqfs.

1. Public Waqfs: Public waqfs are created for the benefit of the public, religious and charitable purposes.

In *Wali Mohd. (dead) L.Rs. v. Smt. Rahmat Bee and others* (AIR 1999 SC 1136), the offerings of the prayers are not confined to prayers at the tomb of the grantor or his family members. The grant was by the head of the order and relates to prayers at a number of tombs in the graveyard. It is, therefore, clear that a Waqf of public nature was created. Therefore the direction for the conduct of Fateha at the graveyard and to use the Rouse for those purposes are certainly valid objects of a Waqf.

2. Private Waqfs: Private waqfs are created for the benefit of the waqf's family. They are also known as waqfs-alal-aulad. A Waqf in favour of one's own family and descendants is called waqf-alal-aulad.

Formalities of Waqf: Muslim law prescribes no specific form for creation of a waqf. It may be oral or in writing. It is not necessary to use any specific word or formula for creation of a Muslim Waqf. Even the word 'waqf' may not be used. What is essential is that the language of the dedication should be clear and unambiguous from which an intention to create a waqf is discernible *(Jeevandas vs. Shah Kubeeroodden,* (1840) 2 MIA 390;

Kursheed Johan vs. Qamaquan Ali, 1947 Oudh.17).

Under all schools of Muslim Law, a waqf may be created *inter vivos* or by a will. Where a waqf is created by a will, it is valid only upon the bequeathable one third, unless the heirs consent to it. *(Ali*

Hussain vs. Fazl (1914) 36 All 431; *Nanboobeg vs. Gulam Hussain,* AIR 1951 Nag. 327).

According to Abu Yusuf, a waqf *inter vivos* comes into existence by a mere declaration of endowment by the owner of the property. Inam Mohemmad on the other hand viewed that a waqf is not complete unless the declaration of endowment is accompanied by the appointment of mutawalli and delivery of possession to him. Under Shia Law, a waqf cannot come into existence unless the declaration of waqf is accompanied by delivery of possession. Under the Shafi law, no delivery of possession is necessary.

Registration: Section 17(1)(b) of the Registration Act provides for the registration of an immovable waqf property worth rupees one hundred or more.

Revocation of Waqf: If a valid Waqf has once been created, it cannot be revoked by the Waqf for it is in the power of nobody to divest God of his ownership of the property. On the creation of the Waqf the property at once passes to God and neither it can be reverted later nor can God be divested of the property and the Waqf or his successor-in-interest restored to it by any subsequent breaches of the terms of the Waqf mutawalli of his office (*Anjuman Islamia v. Latafat Ali,* I.L.R 1950 All. 100). Thus:

1. A testamentary Waqf may be revoked by the author of the Waqf any time before his death. But in this case there is no revocation in facts as the Waqf comes into existence only at the death of the testator. It is in fact revocation of the will rather than of the Waqf.
2. A Waqf during death, illness without consent of heirs is valid only to the extent of 1/3rd of the property and invalid beyond this limit. There is no revocation involved here too.
3. A Waqf created by an act 'inter vivos' is irrevocable. If the Waqf reserves the power of revocation, the Waqf is invalid.

The Administrative and Statutory Control of Waqfs in India: In India the following enactments provided for the protection, etc. of public endowments.

i) Official Trustees Act II of 1913.

ii) Charitable Endowments Act VI of 1890, Sections 2, 3, 4, 5, 6 and 8.

iii) Religious Endowments Act XX of 1863, Section 14.

iv) The Code of Civil Procedure, 1908 Sections 92 and 93.

v) Charitable and Religious Trusts Act XIV of 1920.

vi) In Gujarat and Maharashtra The Bombay Public Trusts Act, 1950 enactment is prevalent.

Statutory Supervision of Waqf: Prior to enactment of Waqf Act, 1995, the following enactments dealt with the administration of land supervision of Waqfs.

i) Waqf Act, 1954.

ii) U.P.Waqf Act, 1950.

iii) Bengal Waqf Act, 1934.

iv) Bihar Waqf Act, 1937.

v) Bombay Public Trusts Act, 1950.

vi) Durgah Khwaja Saheb Act, 1955, and

vii) Section 92 of the Code of Civil Procedure.

MUTAWALLI

Meaning: A person, who manages the waqf property is called 'Mutawalli'. The legal position of Mutawalli is that of the Manager or Superintendent of the waqf properties.

Qualifications and who may be Mutawalli?

Any Muslim male or female who is a major (18 years old) and is of sound mind may be appointed as Mutawalli. No academic qualifications are prescribed for the appointment of a Mutawalli. A

minor may act as a Mutawalli, where the office of the mutawalli is hereditary and the person entitled to succeed is a minor.

Powers of Mutawalli: The powers of Mutawalli are stated below:

1. Power of Management.
2. Power of Alienation.
3. Power to incur debts; and
4. Power to Sue.

1. Power of Management: A mutawalli has the power of management and administration of waqf properties. He has the full power to utilise the waqf property for the purpose of which the waqf has been created.

2. Power of Alienation: He has no power to alienate the Waqf property unless the waqf-deed/waqf-nama specifically authorises/ empowers him to do so. He has to obtain the prior permission of the court to alienate the Waqf properties. Alienation without prior permission of the court is not void *ab initio* but voidable (*Sailendar Nath vs. Hade Kaza,* AIR 1932 Cal. 356).

3. Power to incur Debts: A mutawalli has no power to incur debts. A person who advances a loan (creditor/lender) to Mutawalli for the purpose of the waqf has no remedy against the waqf properties.

4. Power to sue: Before the passing of the waqf Act, 1954, a mutawalli could file a suit relating to a waqf. But after the passing of the Act power to sue is vested in the Waqf Board under whose supervision the mutawallis have to work.

Removal of Mutawalli: When a waqf comes into existence and a mutawalli is appointed, the founder (waqif) has no power to remove him unless a power to that effect has been specifically contained/reserved in the waqf-nama (waqf-deed). The court may remove mutawalli on the ground of misfeasance, breach of trust or unfitness or any other reason, which the court thinks fit.

Apart from the Court and Waqf, the Waqf Board can also remove the mutuwalli from the Mutawalliship. Section 64 of the Waqf Validating Act, 1995 authorises the Waqf Board to remove the Mutawalli from his office. A Mutawalli of a Waqf removed from his office under this section shall not be eligible for re-appointment as a mutawalli of that Waqf for a period of five years from the date of such removal.

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Part-IV
Christian Law

(1) The Special Marriage Act, 1954; (2) The Christian Marriage Act, 1872 and the Indian Succession Act, 1925 (Chapters 1 to 14: Law of Succession) deal with the personal laws of Christians.

WHO IS A CHRISTIAN

Meaning and Definition: A Christian is one, who professes the religion of Jesus Christ. Section 3 of the Indian Christian Act, 1872 defines the term 'Christian' as "a person professing the Christian religion". Under the Act, Indian Christians include native converts to Christianity and their Christian descendants. Generally a person, who is baptized is a Christian. However, he does not become Christian just because at the time of his birth, he is baptized, if he is not in a position to tell the world what is his faith. A person, who professes to be a Christian is a Christian, eventhough he has not been baptized (*K L B David vs. Nilmoni,* AIR 1953 Orissa IV). A child born to Christain parents is a Christian.

Lecture-VIII
Christian Law

This lecture covers the Special Marriage Act in detail and the Christian Marriage Act in brief. The Indian Succession Act is studied in the subject Family Law-II.

1. SPECIAL MARRIAGE ACT, 1954

The Special Marriage Act was passed in the year 1954 and came into force from 1st January, 1955. It applies to the whole of India except the State of Jammu & Kashmir. It contains 51 Sections divided into 8 Chapters. The Act provides for a special form of marriage in certain cases; registration of marriage and divorce.

Under the Act, any two persons (of opposite sex) irrespective of their religion can get married. In other words, the Act provides for validity of marriage between men and women irrespective of caste and religious restrictions.

Conditions of a Valid Marriage under the Act (Sec. 4): A marriage to be valid under the Act, the following conditions are to be satisfied:

1. Monogamy: Neither party has a spouse, living at the time of the marriage.

2. Must not be of unsound mind: Both the parties to the marriage must be of sound mind.

3. Age Limit: The boy and girl must have completed the age of 21 years and 18 years respectively.

4. Prohibited Relationship: The parties to the marriage are not within the degrees of prohibited relationship.

Procedure for solemnization of marriage:

1. Notice (S.5): The parties to the marriage shall give a notice in writing to the Marriage Officer of the District and atleast one of the parties has resided for a period of not less than 30 days immediately preceding the date of such notice.

2. Publication of notice (S.6): A true copy of the notice shall be filed in the 'Marriage Notice Book'.

3. Objection to marriage (S.8): When the notice is published, any person can raise an objection to the proposed marriage. Then, the Marriage Officer has to make necessary enquiry and can pass appropriate orders. (His powers are similar to the powers of a civil court). The parties can file an appeal before the District Court against the order within 30 days.

4. Declaration (S.11): According to Section 11 of the Act, the marriage declaration shall be signed by the parties to the marriage and three witnesses and the same is countersigned by the Marriage Officer.

5. Place and Form (S.12): The Marriage may be solemnized at the office of the Marriage Officer or within the reasonable distance from the office. If the marriage is to take place outside the office,

the parties must be ready to pay the additional fees. The parties shall say in the presence of Marriage Officer and 3 witnesses.

"I (A) take thee (B), to be my lawful wife (or husband)"

It can be said in any language as understood by the parties.

6. Certificate of marriage (S.13): After the marriage is solemnized, the Marriage Officer enters the marriage in the 'Marriage Certificate Book' and issues Marriage Certificate. The certificate is to be signed by the parties and the witnesses.

Other provisions of the Act:

1. Section 4 deals with Void and Voidable Marriages.
2. Section 22 deals with Restitution of Conjugal Rights.
3. Section 23 deals with Judicial Separation.
4. Section 27 provides for the grounds for divorce.
5. Section 28 speaks about the divorce by mutual consent; and
6. The Law of Succession applicable to the parties (who got married) under the Act is Indian Succession Act, 1925.

2. THE CHRISTIAN MARRIAGE ACT, 1872

According to Christian Law, marriage is a permanent union of one man and woman to the exclusion of all others. The Indian Christian Marriage Act was passed in 1872 to regulate marriage among Christians. It contains 88 Sections and three Schedules. Under the Act, marriage can be solemnized/performed between two Indian Christians and non-Christians.

The Conditions/Essentials of a Christian Marriage

1. Religion: In fact, this Act is intended to explain the provisions relating to Christian marriages. Section 4 of this Act lays down that one of the intended spouses must be a Christian. If both of them are Christians, it is welcome. If both the parties are not Christians, the provisions of this Act do not apply and their marriage cannot be

performed under this Act. The persons may profess any sect of Christianity, i.e. Roman Catholic or Presbytarian or any other sect of Christianity (Section 4).

2. Age: The age of the bridegroom shall not be under twenty-one years, and the age of the bride shall not be under eighteen years (Section 60(1).

There is a restriction on minimum age, i.e. 21 and 18 years respectively for bridegroom and bride. However, there is no restriction on maximum, and the age differences between the spouses. A bridegroom may have 30 years and a bride may have 40 years.

3. Shall not have living spouse: Neither of the persons intending to be married shall have a wife or husband still living (Section 60(2).

4. Marriage should be performed by licensed persons: The marriage under this Act becomes valid, only when it is performed by the licensed person/authority under this Act (Section 60(3).

Section 5 lays down the provisions about 'Persons by whom marriages may be solemnized'. According to this Section, the following persons are the authorized persons/authority to perform the Christian marriages:

a) any person who has received Episcopal ordination, provided that the marriage be solemnized according to the rules, rites, ceremonies and customs of the Church of which he is a minister;

b) any Clergyman of the Church of Scotland, provided that such marriage be solemnized according to the rules, rites, ceremonies customs of the Church of Scotland;

c) any Minister of Religion licensed under this Act to solemnize marriages;

d) a Marriage Registrar appointed under this Act;

e) any person licensed under this Act to grant certificate of marriage between Indian Christians.

5. Witnesses: There must be at least two credible witnesses other than the licensed person, and should witness the marriage ceremony (Section 60(3).

6. Solemnization: Each of the parties to the marriage shall say to the other: 'I call upon these persons here present to witness that I, 'AB' in the presence of Almighty God, and in the name of our Lord Jesus Christ, do take thee, 'CD' to be my lawful wedded wife or husband' or words to the like effect (Section 60(3).

7. Time for solemnizing marriage: Every marriage under this Act shall be solemnized between the hours of six in the morning and seven in the evening (Section 10).

8. Place for solemnizing marriage: As a general rule, the marriage should be solemnized in the Church. If there is no Church within five miles distance by the shortest road from the proposed marriage place, or an application received specifying any special reasons to solemnize the marriage, the marriage officer/authority may solemnize such marriage recording the reasons for it (Section 11).

9. Notice of intended marriage: One of the persons intending marriage shall give notice in writing, according to the form contained in the First Schedule of the Act to the concerned marriage officer, whom he or she desires to solemnize the marriage, and shall state therein:

a) the name and surname, and the profession or condition, of each of the persons intending marriage;

b) the dwelling-place of each of them;

c) the time during which each has dwelt there;

d) the Church or private dwelling in which the marriage is to be solemnized (Section 12).

10. Certificate of Marriage: The Marriage officer/authority shall issue Certificate of Marriage in the form contained in the Second Schedule to this Act. This certificate is a conclusive evidence of the marriage (Section61).

Questions and How to Answer

Q) Marriage formalities under Special Marriage Act. (A.U. Model Q.P. Part-A, Q.2; and S.V.U. November 1999, Part-A, Q.2, Marks: 4).

Q) Describe the procedure for solemnization of marriage under Special Marriage Act, 1954? What are the conditions and consequences of such marriage. (N.U., April 1999, Part-B, Q. 14, Marks: 18).

Part V

Lecture-IX
The Family Courts

The Family Courts are designed for speedy trial and quick disposal of matrimonial disputes (i.e. the disputes between the husband and wife). In view of increase in the incidence of matrimonial disputes and increasing pendency of the cases in the civil and criminal courts, Judges, women organizations etc. requested the Central Government to pass a special legislation to deal exclusively with matrimonial matters. The Law Commission vide its reports 54 and 55 (1974) recommended the Government to pass a special enactment for establishment of Court/Courts to deal with family matters. As a result, the Family Courts Act was passed in 1984 for the establishment of Family Courts in India.

It will be brought into force only when the Central Government issues a notification in the Official Gazette, and different dates may be appointed for different States. In some States it has been brought into force in some cities.

In *M.P.Gangadharan v. State of Kerala* (2006 SC 2360), the Supreme Court has held that Family Court should be established not only because it is provided in the Act but the state must be alive to the situation that it has a duty to provide all infrastructure to the forum of dispute resolution.

Concept of Family Court: In some western countries, family courts are already functioning. Now it is accepted by most, that litigation in respect of any matter concerning family, whether divorce, maintenance, custody of children and trial of juvenile offenders should not be viewed in terms of failure or success of legal action, but as social therapeutic problem. No court which is engaged in finding out what is better for the welfare of the family, whether a marriage has broken down or not, who should have custody of children or which spouse needs maintenance, should rest content with the assertions and contentions of the parties and evidence led by them to prove

or disprove their contentions and allegations. The court engaged in this task requires a less formal and more active investigational and inquisitional procedure. In short, this will imply that it is not a litigation in which parties and their counsels are engaged in winning or defeating a legal action but parties, lawyers, social workers, welfare officers and psychiatrists, all are engaged in finding out a solution to the problem or problems engaging the attention of the court. Thus, the concept of family court implies an integrated broad based service to families in trouble. It stipulates that the family court structure should be such as is meant to preserve the family, and to help to stabilize the marriage. Obviously, for such a system, the adversary litigation system is hardly appropriate. Such a system visualizes the assistance of the specialized persons and agencies.

The Family Courts Act, 1984: It is a progressive legislation. It contains 23 Sections. Initially, the Act did not draw the attention of all the State Governments. In course of time, it attracted the attention of several states. Under the Act, Family Courts have been established in some states. The States and High Courts concerned are empowered under the Act to frame necessary rules. The State of A.P. framed the A.P. Family Courts (High Court) Rules, 1995.

The object of the establishment of Family Court is to promote conciliation, and speedy settlement of disputes relating to marriage and family affairs. The High Court of a State is empowered to establish the Family Courts in consultation with the State Government, for those towns and cities whose population exceeds one million. The Judges of the Family Courts are appointed by the State Government with the consent of the High Court. A Family Court may consist of a single Judge or more than one Judge.

The Family Court is higher than the District Court and lower than the High Court.

Qualifications: Following are the qualifications for the appointment as Judge of the Family Court:

1. Atleast 7 years experience as a Judicial Officer.

2. An advocate of High Court having not less than 7 years standing.

3. He must be a member of a Tribunal etc.

The age of retirement of the Family Court Judge is 62 years. Women will be given preference for the appointment as Judges of the Family Courts.

Jurisdiction of the Family Courts: Section 7 of the Family Courts Act, 1984 provides the list. It can exercise jurisdiction in the following cases:

1. A suit or proceeding between the parties to a marriage for a decree of nullity, Restitution of Conjugal Rights, Judicial Separation and Divorce.
2. A suit or proceeding as to the validity of a marriage or as to the Matrimonial status of any person.
3. A suit or proceeding between the parties with respect to the property.
4. Custody and financial support to children.
5. Maintenance of wives, children and old parents.

In *Shyni v. George*, (1997 Ker 231), it was held that wife can implead a close relative of her husband or even a stranger on allegations that the husband had handed over the property to them in a suit for recovery of the property. This would not oust the jurisdiction of the Family Courts.

In *K.A.Abdul Jaleel v. T.A.Sahida* (1997 Ker 269), the expression 'parties to the marriage' was held to include a divorced wife and a petition filed by her for declaration and partition of property jointly acquired by them would be maintainable.

Decree of Family Court – Civil Court's Jurisdiction: A civil suit to declare the decree of family court as null and void is not maintainable (*Shahnaz v. Shirim*, 1995 Bom. 30). Family court's jurisdiction will have precedence over our matrimonial and family law statutes.

Scope of interference in appeal in order of Family Court: No specific procedure has been prescribed by statute to be followed by Family Court deciding application for custody of minor child. The only thing to be considered by Court is whether the procedure adopted by Family Court was in accordance with principles of natural justice. Paramount consideratioin was welfare of the child (*Dr.Rohit Dandekar v. Dr.Raj Kavitha*, (2004) 1 DMC 216 (Kant.) (DB).

The Family Courts are well established in the State of Karnataka.

Questions and How to Answer

Q) Objectives for establishing Family Courts. (A.U. Model Q.P. Part-A, Q.5; S.V.U. November 1999, Part-A, Q.8, Marks: 4)

Q) Write a Critical essay on Family Courts Act, 1984 and critically examine jurisdiction of Family Court particularly? (A.U. November 1999, Part-B, Q. 3, Marks: 18)

Q) Write a critical essay on Family Courts. (A.U., July 2000, Part-B, Q.2, Marks: 18).

Q) What is the necessity for establishing Family Courts in India. (N.U. April 1999, Part-A, Q. 10, Marks: 4).

Lecture-X
Uniform Civil Code

Introduction: India is a Secular State. The word 'Secularism' under the law means, that "the State does not owe loyalty to any particular religion and the state has no religion of its own". It protects all religions viz. Hindu, Muslim, Christian, Parsi etc. who are governed by the respective personal laws. For instance, Hindus are governed by Hindu Marriage Act, 1955; Muslims are governed by the Dissolution of Muslim Marriage Act, 1939; Christians are governed by the Christian Marriage Act, 1872; Parsis are governed by the Parsi Marriage Act of 1939 and so on. According to these personal law legislations, the rules/conditions of marriage, divorce, adoption, maintenance etc. vary (differ) from one religion to the other resulting in so many problems and matrimonial conflicts. For example, a Hindu male cannot have more than one wife. Strict compliance to the principle of 'monogamy' (one must not have more than one spouse) is mandatory under Section 5(i) of the Hindu Marriage Act, 1955. Violation of monogamy (if a person marries again during the life time of his/her spouse) amounts to bigamy under Section 17 and the marriage is void under Section 11 of the Hindu Marriage Act. Further, the person, guilty of bigamy is liable for punishment under Sections 494 and 495 of the Indian Penal Code, 1860. But, according to Mohemmadan (Muslim) Law, a Muslim male can have four wives at a time. If one among the four dies or divorced, he can marry again. If he marries beyond four wives, even then, the fifth marriage is not void, but irregular and it can be rectified/legalised by giving divorce to one of the four wives. May be because of this position in Muslim Law, many non-Muslims, who wish to have more than one wife are getting converted to Islam (Muslim religion). There are so many cases, which came for discussion before the Supreme Court, the maladies under distinct codes for different religions in the same territory of India. Therefore, the Judges, Jurists, Academicians and other distinguished personalities favour and strongly support Uniform Civil Code in India.

Meaning & Scope: The expression "Uniform Civil Code" literally means "Common Code" for all citizens irrespective of their religion". It (Uniform Civil Code) was incorporated in Article 44 of the Indian Constitution under Part-IV: Directive Principles of State Policy.

Article 44 of the Indian Constitution directs, in order to cut across religion, caste and tribes and to build up a homogenous nation that **"the State shall endeavour to secure for the citizens, a uniform civil code throughout the territory of India."**

The preamble of the constitution sets forth the ideals and goals to be achieved by the State for setting up a Social Welfare State. For this purpose, Directive Principles of State Policy are provided for under Part-IV (Articles 36 to 51) of the Constitution. As the directive principles are not enforceable, an individual cannot approach the court (High Court or Supreme Court) for enforcement of Art. 44, which envisages uniform civil code.

Introduction of Uniform Civil Code is not an easy task, since it would be very difficult to bring the persons of different faiths and persuasions on a common platform. However, the Supreme Court in *Ms. Jordan Diengdeh vs. S.S. Chopra,* (AIR 1985 SC 931) and *Mohd. Ahmad Khan vs. Shah Bano Begum,* (AIR 1985 SC 945) held that **"a beginning has to be made if the Constitution is to have any meaning".**

The Supreme Court in its recent landmark decision in: *Sarla Mudgal vs. Union of India,* (1995) 3 SCC 635 directed the Union Government headed by the then Prime Minister, Sri P.V. Narasimha Rao, to take a fresh look at Art. 44, which enjoins the State to secure uniform Civil Code. The Government through the Secretary to Ministry of Law and Justice, filed an affidavit by August indicating the steps taken and efforts made by the Government towards securing the Uniform Civil Code.

But, unfortunately, the Court, while hearing an appeal preferred by one of the accused in the above case made it clear that the **direction**

given was only an obiter dicta and that it was **not legally binding on the Government.**

The question involved in *Sarla Mudgal's case* was, whether a Hindu male married under Hindu Law, by conversion to Islam can solemnize a second marriage without dissolving the first marriage? The Court held the marriage illegal and the respondent (husband) was prosecuted for bigamy under Section 494 of the Indian Penal Code.

There are several instances of bigamy by Hindu males by converting to Islam. The court after taking into consideration, the facts and circumstances of the case, held that **"a Hindu marriage continues to exist even after one of the spouses converted to Islam".**

Since 1950, many Governments have come and gone. But, no Government made a serious attempt to implement the constitutional mandate under Article 44. Consequently, the problem today is that many Hindu males, having the spouse living, by embracing Islam are getting married again without any fear of the consequences of bigamy.

Further, the Supreme Court in *Mohd. Ahmad Khan vs. Shah Bano Begum,* AIR 1985 SC 945— held that, a divorced Muslim woman is entitled to claim maintenance under Section 125, Cr.P.C. on the ground that Sec. 125, Cr.P.C. is a general provision and is applicable to all irrespective of their religion. However, the leaders/ heads of the Muslim religion criticised that the Supreme Court through Sec. 125, Cr.P.C. interfered in Muslim personal law and demanded to omit/amend Sec. 125 of the Criminal Procedure Code, 1973. To remove the above conflict, Muslim Women (Protection of Rights on Divorce) Act, 1986 was passed. The Act discharges the Muslim male from the liability to maintain his wife, divorced without reasonable cause. She has to rely/depend on her relatives for maintenance.

In view of the above, there is an urgent need for the introduction/ implementation of the uniform civil code, a constitutional mandate under Article 44 of the Constitution.

Reasons: Following are some of the reasons, which support the implementation of the Uniform Civil Code.

1. As the Muslim Law permits four wives at a time, many non-Muslims, who wish to have more than one wife are getting converted to Islam to escape from the consequences of bigamy.

2. Distinct systems of personal law in the matters of marriage, divorce, adoption, maintenance etc. would lead to matrimonial conflicts resulting in socio economic imbalances.

3. Jurists, Judges, Academicians and other welfare organisations strongly support the introduction of Uniform Civil Code.

4. Dr. Tahir Mahmood in his 'Muslim Personal Law, 1977 Edn. pp. 200-202 made a powerful plea for framing a uniform civil code for all citizens of India.

5. At the seminar held on 18.10.1980 under the auspices of the Department of Islamic and Comparative Law, Indian Institute of Islamic Studies, New Delhi, an appeal was made to the Muslim Community to display by their conduct, a correct understanding of Islamic concepts on marriage and divorce.

6. Kuldip Singh, J., while delivering the Judgment in *Sarla Mudgal vs. Union of India,* (1995) 3 SCC 635, said that Article 44 is based on the concept that there is no necessary connection between religion and personal law in a civilised society.

   Marriage, succession and like matters are of a secular nature and therefore, they can be regulated by law.

7. Islamic countries like Pakistan, Syria, Iran etc. have taken necessary precautions, while codifying their personal laws without giving room for any criticism or abuse.

8. Finally, academicians and other distinguished personalities in the 'Seminars and Conferences on Hindu Law and Comparative Family Institutions" supported the introduction of Uniform Civil Code in India.

In view of the above, it can be rightly said that there is an urgent need for the introduction/implementation of Uniform Civil Code in India.

Questions and How to Answer

Q) Uniform Civil Code. (A.U., July 2000, Part-A, Q.7, Marks: 4).

Q) What is meant by Uniform Civil Code? (N.U., April 1999, Part-A, Q.9, Marks: 4).

Ans: Write in brief i.e. in one page.

Q) "The state shall endeavour to secure for the citizens, a uniform civil code throughout the territory of India". (Art. 44 of the Indian Constitution) - Explain the connotations of this directive and impediments to the formulation of "Uniform Civil Code". (N.U., September 1999, Part-B, Q. 14, Marks: 18).

Ans: Write in detail (i.e. the whole lecture on Uniform Civil Code).

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UNIVERSITY QUESTION PAPERS

Code No. 3181

FACULTY OF LAW

LL.B (3YDC) I-Year II-Semester Examination,

April/May, 2009

Subject : LAW

Paper: II - Family Law-II (Muslim Law and Other Personal Law)

Time : 3 Hours] **[Max. Marks : 80**

PART - A (5x6=30 Marks)

Answer any five of the following :

1. Sources of Muslim Law
2. Dower (Mahr)
3. Dissolution of Muslim Marriage Act, 1939
4. Iddat
5. Acknowledgement of Paternity
6. Mutawalli
7. Intestate succession and testmentary succession
8. Domicile

PART - B (2x15=30 Marks)

Answer any two of the following :

9. What are the essential requirements of a valid marriage under Muslim law ?
10. Define Gift. What are the legal aspects of gift under Muslim law ?
11. What are the essential of Waqf ?
12. Explain the salient features of Special Marriage Act, 1954.

PART - C (2x10=20 Marks)

Answer any two of the following :

13. The marriage between A and B was dissolved by talaq. A, the divorced husband provided maintenance to his wife during the period of iddat, the divorced wife approached the magistrate under section 125 Cr.P.C. for further maintenance. What is your opinion ?

14. A Sunni Muslim wants to give his entire property to his grandson ignoring all his relatives. What is your advice ?

15. X, a Mutawalli wants to sell a portion of Waqf property for payment of wages of the workers who are employed to maintain Waqf property. What is your opinion ?

16. X, an Indian Christian dies leaving behind his mother, father, wife/son and daughter. At the time of his death he was having Rs. 3,00,000. How this will be distributed ?

Code No. 1017

FACULTY OF LAW

LL.B. (5 Y.D.C.) III Year V Semester Examination, Nov./Dec. 2009

LAW

Paper - III: Family Law - II

(Muslim Law and Other Personal Laws)

Time: 3 Hours] [Max. Marks: 80

PART-A

Answer **any five** of the following : **(5x6=30 Marks)**

1. Sunni Law and Shia Law

2. Effects of conversion

3. Dower (Mahr)

4. Valid gift
5. Waqf Board
6. Indian Succession Act, 1925
7. Duties of Mutawalli
8. Special Marriage Act, 1954.

PART-B

Answer **any two** of the following : **(2x15=30 Marks)**

9. Explain the essential requirements of a valid marriage under Muslim Law.
10. What are the ground available to a Muslim Women to dissolve her marriage under Dissolution of Marriage Act, 1938?
11. Define Guardian. Explain different kinds of guardians under Muslim Law.
12. Define Waqf and explain essentials of valid Waqf.

PART-C

Answer **any two** of the following : **(2x10=20 Marks)**

13. A Muslim husband always compares his wife with his mother and other female relatives within a prohibited degree of marriage. What is the remedy available to the wife?
14. A Muslim husband pronounced Triple Talaq to his wife. What is the validity and consequences of Triple Talaq ?
15. A Sunni Muslim has bequeathed his entire property through a will in favour of a Darga to perform religious functions. After his death the wife and son objected the execution of the will. What is your opinion ?
16. A Christian died as an intestate leaving behind his wife, two children, father and mother. At the time of his death

he was having worth of Rs. 3 lakhs of movable and immovable property-distribute the property.

Code No. : 1172/N

FACULTY OF LAW

LL.B. (3 Y.D.C.) I Year II Semester Regular (New) Examination, May/June 2010

LAW

Paper - II: Family Law - II (Muslim Law)

Time: 3 Hours] [Max. Marks: 80

PART - A

Answer any five of the following : **(5 x 6=30 Marks)**

1. *Hiba*
2. Maintenance of Muslim wife
3. Legitimacy of children
4. Triple *Talaq*
5. Doctrine of *Aul*
6. *Mutawalli*
7. Option of Puberty
8. Irregular Marriages.

PART - B

Answer any **two** of the following : **(2 x 15=30 Marks)**

9. What is Dower *(Mahr)*? Explain its object and classification.
10. What is Divorce ? Explain the classification of divorces with special reference to *Talaq*.
11. Explain the essentials of *Waqf*. How is it created and revoked ?

12. Explain the salient features of the Special Marriage Act, 1954.

PART-C

Answer any **two** of the following : **(2x10=20 Marks)**

13. A Muslim male already married to a Muslim lady, wants to marry her sister. If contacted, what will be the nature of such marriage ? Will it be valid ?

14. A Muslim male, who is living abroad would like to divorce his wife living in India. For this purpose, he delegated this right to his father. Will such delegation be valid.

15. A Sunni Muslim male dies leaving behind a wife one son and two daughters. Distribute the shares among the legal heirs.

16. A Muslim women divorced by her husband, claims maintenance from the former husband beyond the *Iddat*' period. Can she succeed ? Explain.

Code No. 1017/N/S

FACULTY OF LAW

LL.B. (5 Y.D.C.) III - Year V- Semester (Backlog) (New) Examination, May/June 2010

Subject: LAW

Paper-III: Family Law - II

(Muslim Law Including Other Personal Laws)

Time : 3 Hours] **[Max. Marks : 80**

PART - A

Answer **any five** of the following: **(5x6=30 Marks)**

1. Sources of Muslim Law

2. Irregular Marriage

3. Definition of Gift

4. Kinds of Waqf
5. Domicile
6. Intestate Succession
7. Dower
8. The Muslim Women (Protection of Rights on Divorce) Act, 1986

PART - B

Answer any two of the following : **(2x15=30 Marks)**

9. What are the different modes of Talaq? Explain
10. What are the powers and functions of Mutawalli under Muslim Law ?
11. Explain the salient features of Indian Divorce Act, 1869.
12. Explain the concept of acknowledgement of paternity.

PART - C

Answer any two of the following : **(2x10=20 Marks)**

13. A Muslim dedicated his property to a religious trust and appointed Mr. Basha as a Mutawalli. But Basha is using this property for his personal need - What is the remedy ?
14. A Christian male and a Hindu female requested the Registrar of Marriages for solemnization of marriage under Special Marriage Act, 1954. What is the procedure to be followed ?
15. A Muslim dies leaving behind his wife, father, mother, daughter and son. At the time of his death he was having his self acquired property worth of Rs.5 lakhs. Distribute the property?
16. A and B married under Christian law. A the husband went to UK on special training leaving his wife in India. In the

absence of A, his parents demanded additional dowry from B. The same was informed by B to her husband through e-mail. A in his reply supported his parents. What is the remedy available to B ?

Code No.: 9149

FACULTY OF LAW

B.A., LL.B. (5 YDC) II Year IV - Semester Examination, May/June 2011

LAW

Paper - V : Family Law - II

(Muslim Law and Other Personal Laws)

Time: 3 Hours] **[Max. Marks: 80**

PART - A

Answer any five of the following (5x6=30 Marks)

1. Custom
2. Dower
3. Talak Zihar
4. Irregular marriage
5. Hiba
6. Mutawalli
7. Shares
8. Doctrine of AUL.

PART-B

Answer any two of the following : (2x15=30 Marks)

9. Explain the essential requirements of valid Muslim Marriage.
10. What are the salient features of the Muslim Women (Protection of Rights on Divorce) Act, 1986.

11. Distinguish between Will and Gift and explain the differences between Shia and Sunni law.

12. Explain the salient features of Indian Divorce Act, 1869.

PART-C

Answer any two of the following: (2x10=20 Marks)

13. A Sunni male married to a Hindu women as his fifth wife. Is it a valid marriage ?

14. A Muslim husband gifted some property in favour of his wife. Later he wants to revoke the gift. It is possible ?

15. A Christian died leaving behind his widow, father, mother and two brothers. Distribute the property.

16. A Muslim created a wakf by depositing one lakh in bank for purchase and distribution of Islamic Religious books. Mutawalli had spent the money for repairs of mosque. Whether the action of the mutawalli is correct ?

Code No. 9165 / BL

FACULTY OF LAW

LL.B. (5 YDC) III-Year V-Semester (Backlog) Examination, June /June 2011

Subject: LAW

Paper : III

Family Law (Muslim Law Including Other Personal Laws)

Time : 3 Hours] [Max. Marks : 80

Note : Answer all questions.

Part - A (5 x 6 = 30 Marks)

Answer any **FIVE** of the following :

1. Subschools of Sunni Law

2. Mahr (Dower)

3. Proper divorce (Talak hasan) :
4. Presumption of legitimacy of a child under muslim law
5. Concept of minority according to muslim law
6. Formalities of Waqf
7. Revocation of gift (Hiba)
8. Civil marriage by Registration

Part - B (2 x 15 = 30 Marks)

Answer any **TWO** of the following :

9. Explain the origin and development of Muslim Law.
10. Explain the salient features of the Muslim women (Protection of Rights on Divorce) Act, 1986.
11. Explain the meaning of Guardianship. What are the different kinds of guardianship according to Muslim law.
12. Define Waqf. Explain the creation and revocation of waqf.

Part-C (2x10 = 20 Marks)

Answer any **TWO** of the following :

13. During the subsistence of a marriage, a mohomadan married his wife's sister. What are the legal effects of such marriage?
14. X, a mohomedan acknowledges Y as his son under circumstances in which his marriage to B's mother is not proved. Is the acknowledgement valid?
15. 'M' a mohomedan bequeaths property to the son of his brother. The son is born 8 months after the testator's death. Is bequest valid?
16. Mr. A professing Hindu religion desires to marry Miss. B, who professes Christianity. Can he do so? If he can, what procedure is to be followed?

Code No. 9165/R2

FACULTY OF LAW

LL.B. (5YDC) III-Year V-Semester Examination,

April /May 2011

Subject: LAW

Paper: III

Family Law - II

Muslim Law (including other Personal Laws)

Time : 3 Hours] [Max. Marks : 80

Part - A (5 x 6 = 30 Marks)

Note : Answer any **Five** of the following:

1. Origin of Muslim Law
2. Effects of conversion to Islam
3. Different modes of Talaq
4. Effect of acknowledgement of paternity
5. Kinds of guardianship
6. Void (Batil) marriage
7. Definition of gift (Hiba)
8. Void wills according to Indian Succession Act

Part - B (2 x 15 = 30 Marks)

Note : Answer any **Two** of the following :

9. Explain the nature and kinds of dower under Mohammedan law.
10. Explain the requisites of a valid wakf.
11. What are the main points of difference between the Hanafi and Shia laws of inheritance.
12. Discuss the scheme of intestate succession of male Christian under the Indian Succession Act, 1925.

Part-C (2x10 = 20 Marks)

Note : Answer any **Two** of the following :

13. X, a Mohammedan woman, lived with her husband Y for six months and then went to her parents. After two years she sued for dissolution of marriage on the ground that she was not maintained by the husband for two years. Is X entiled to claim dissolution of marriage with y?

14. A Mohammedan woman represents herself as guardian of her minor daughters and sells the property, which was inherited by her and her daughters. Whether such a sale is binding on the daughters?

15. X, a Mohammedan bequeaths his entire property to his paternal grandfather. X is survived by his son, and mother. Is paternal grandfather an heir?

16. A Hindu marries his father's sister's daughter who embraces Christianity, under the Special Marriages Act, 1954. Is the marriage valid.

Code No. 9131 / R2

FACULTY OF LAW

B.A., LL.B. (5 YDC) II-Year III-Semester Examination,

April / May 2011

Subject: LAW

Paper : V

Family Law -1 (Hindu Law)

Time : 3 Hours] [Max. Marks : 80

Part - A (5 x 6 = 30 Marks)

Note : Answer any **Five** of the following :

1. Joint Family
2. Mitakshara and Dayabhaga schools

3. Monogamy
4. Pious obligation
5. Notions partition
6. Effect of adoption
7. Maintenance pendentelite
8. Nullity of Marriage

Part- B (2x15 = 30 Marks)

Note : Answer any Two of the following:

9. Who is a "Karta"? Discuss briefly his powers and functions.
10. Define the term "marriage" write a brief note on the importance of institution of marriage under hindu law.
11. Explain briefly the various matrimonial remedies available under the Hindu Marriage Act, 1955.
12. Examine the various grounds of divorce under the Hindu Marriage Act, 1955.

Part - C (2 x 10 = 20 Marks)

Note : Answer any **Two** of the following :

13. Ramesh, a Hindu boy aged 16 years married a Muslim girl, Razia aged 14 years in accordance with the Hindu customs. Is the marriage valid? Give reasons.
14. A man after spending a reasonable period of time with his wife suddenly one day without any reasonable excuse withdraws from the company of the wife. Is there a remedy for the wife.
15. A Hindu male dies interstate leaving behind a wife, mother father, brother and a sister. He had acquired though his own means property of Rs.5,00,000/-. Can this property be distributed as per the provisions of the Hindu Marriage Act 1955, If so, how?

16. If a wife dies, can the husband seek from the count of law a decree of nullity of marriage to his dead wife i.e. posthumously.

Code No. : 9014

FACULTY OF LAW

LL.B. (3 Y.D.C.) I Year II Semester Examination, May/ June 2011

LAW

Paper - II

Family Law - II (Muslim Law)

Time: 3 Hours] [Max. Marks: 80

PART-A

Answer **any five** questions. **All** questions carry **equal** marks : (5x6=30 Marks)

1. Origin of Muslim Law.
2. Muta marriage.
3. Khula.
4. Will (Wasiyat).
5. Domicile for purpose of the Special Marriage Act, 1954.
6. Wakf Tribunal.
7. Iddat period.
8. Deferred Dower.

PART-B

Answer **any two** questions. **All** questions carry **equal** marks : (2x15=30 Marks)

9. Explain the sources of Muslim Law.
10. Discuss the essential requirements of Muslim marriage. Distinguish between void, irregular and valid marriages.

11. Define Gift (Hiba) under Muslim Law. Explain the requisites of a valid gift. How can it be revoked ?
12. Explain the salient features of the Wakf Act, 1995.

PART - C

Answer **any two** of the following. **All** questions carry **equal** marks : (2x10=20 Marks)

13. A Muslim marriage is contracted without any 'Dower' fixed by the parties. Will such marriage be valid ? Explain.
14. A Hindu male converts himself into a Muslim and contracts a second marriage, without dissolving the first marriage. Explain the validity of the second marriage.
15. A Muslim male dies intestate leaving behind two sons and two daughters. Distribute his property as per Sunni Law of succession.
16. A Muslim would like to give away 50% of his property by will to his near relatives. Can he bequeath such an extent of property ? Explain.

Code No: 1008

FACULTY OF LAW

LL.B. (3 YDC) I Year II Semester Examination, July/August 2012

LAW

Paper - II : Family Law - II

Time: 3 Hours] [Max. Marks: 80

PART-A

Answer **any five** of the following (5x6=30 Marks)

1. Schools of Muslim law
2. Dower
3. Hiba
4. Acknowledgement of paternity

5. Triple Talaq
6. Mutawalli
7. Sharers
8. Indian Succession Act, 1925,

PART-B

Answer **any two** of the following: (2x15=30 Marks)

9. What are the sources of Muslim Law ?
10. What are the essential requirements of a marriage under Muslim Law ?
11. What are the different modes of the Talaq ?
12. What are the salient features of the Indian Divorce Act, 1869 ?

PART-C

Answer any two of the following: (2x10=20 Marks)

13. A Sunni male married a Hindu girl (Non Kitabian). What is the status of the Marriage ?
14. A Muslim died intestate leaving behind his mother, daughter and son. What are the shares of legal heirs ?
15. A Christian died leaving behind his mother, father, wife and two children. What are the shares of legal heirs ?
16. A Waqf is created for the purpose of providing medical education to poor Muslim children. But the Mutawalli used the funds for constructing a new Mosque. What is the legal validity of the act done by Mutawalli.

Code No.: 1008/R

FACULTY OF LAW

LL.B. (3YDC) I Year II Semester Examination, September/October 2012

LAW

Paper - III: Family Law - II Muslim Law (Including Other Personal Laws)

Time: 3 Hours] [Max. Marks: 80

PART-A

Answer any five of the following. (5x6=30 Marks)

1. Schools of Muslim Law
2. Void and Irregular Marriage
3. Triple Talaq
4. Acknowledgement of Paternity
5. Will
6. Mutawalli
7. Waqf Tribunal
8. Indian Succession Act, 1925.

PART-B

Answer **any two** of the following. (2x15=30 Marks)

9. What are the sources of Muslim Law ?
10. What are the grounds of divorce *a* Muslim woman can seek relief under Dissolution of Muslim Marriage Act, 1939.
11. Explain the meaning of the Guardian. What are the different kinds of Guardians under Muslim law?
12. What are the salient features of the Indian Divorce Act, 1869 ?

PART-C

Answer any two of the following (2x10=20 Marks)

13. A (boy) and B (girl) are persons professing different religions in India. They are living in different districts in Andhra Pradesh. What is the law applicable to them ? What is the procedure to be followed for solemnization of marriage.
14. A Muslim wants to gift away his entire self acquired property for religious and spiritual purpose. He is seeking your legal opinion - Advice.
15. A, a Muslim male always describes and compares his wife with his sister. Aggrieved by the behavior of the husband, the wife is seeking your legal advice -Explain.
16. A Christian wants to marry according to the Christian law of marriage. Explain him the procedure and formalities to be fulfilled for solemnization of marriage under Christian Law.

Code No. 1102/0

FACULTY OF LAW

LL.B. (5 YDC) III Year V - Semester (OLD) Examination, July / August, 2012

Subject: LAW

Paper - III Family Law - II Muslim Law (Including Other Personal Laws)

Time: 3 Hours Max.Marks: 80

PART - A (5x6 = 30 Marks)

Note: Answer any Five of the following.

1. Sources of Muslim Law
2. Dower and its classification
3. Dissolution of Muslim Marriage Act, 1939

4. Definition of Gift *(Hiba)*
5. Creation and revocation of *Waqf*
6. *Mutawalli*
7. Grounds of divorce under Indian Divorce Act, 1869
8. *Iddat.*

PART - B (2 x 15 = 30 Marks)

Note: Answer any two of the following.

9. What are the essential requirements of the valid marriage under Muslim Law?
10. Explain the different modes of *Talaq.*
11. Define Guardian. What are the kinds of Guardians? When a Guardian can be removed?
12. What are the salient features of the Special Marriage Act, 1954?

PART - C (2 x 10 = 20 Marks)

Note: Answer any two of the following.

13. The marriage of A and B was solomnised according to the Christian Marriage Act, 1872. After solomnised of marriage they lived separately for a period of 2 years and wanted to take divorce by mutual consent. Is it possible, if so what is the law and legal position.
14. A Waqf is created for the purpose of providing medical education to poor muslim children. But the *Mutawalli* used the funds for constructing a new mosque. What is the legal validity of the act done by Mutawalli?
15. A Hindu dies leaving behind a Will. According to the Will, the whole property is bequeathed in favour of his daughter. There is an objection from his son and wife in execution of this Will. Give legal opinion.
16. If a muslim wants to give away the whole property belongings to him to a religious trust. Give legal opinion.